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Supreme Court of the United States

October Term, 1978

No. 78-1903

FREDERIC B. INGRAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. A, pp. 1a - 74a, *infra*) has not yet been reported. The district court wrote no opinion.

JURISDICTION

The opinion and judgment of the court of appeals was filed on March 16, 1979. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 23, 1979 (Pet. App. B, pp. 75a-76a, *infra*). On May 15, 1979, Mr. Justice Stevens extended

the time for filing a petition for a writ of certiorari to and including June 22, 1979 (Pet. App. C, p. 77a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

18 U.S.C. § 1952 provides, in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to -
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b) of the Federal Rules of Evidence provides:

> *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

QUESTIONS PRESENTED

1. Whether evidence that the chairman of a multinational corporation authorized a payment to a corporate official in a foreign country is admissible under Rule 404(b) of the Federal Rules of Evidence to establish criminal intent in a prosecution for authorizing the payment of bribes in the United States, without any evidence that the payment was unlawful or unethical in the foreign country.

2. Whether the court below correctly held that evidence of other crimes or wrongful acts is admissible to show criminal intent without a showing—required in the Fifth Circuit—that the charged offense and the prior offense require the same intent.

3. Whether a court of appeals may sustain a trial court's determination under Rule 403 of the Federal Rules of Evidence that the probative value of proffered evidence is not outweighed by the danger of unfair prejudice, by evaluating only the deliberateness with which the trial court approached the question and making no judgment whatever as to the relevance and prejudice of the particular evidence.

4. Whether a pretrial severance should be granted when it is clear, promptly upon indictment, that codefendants will be presenting "completely antagonistic" and "mutually exclusive" defenses.

5. Whether knowledge or reasonable foreseeability of the use of facilities of interstate commerce is an essential element of a violation of 18 U.S.C. § 1952.

6. Whether the trial court's novel jury instruction on the extortion defense, directing the jury to reject the defense if any one of five propositions were established by the prosecution, improperly departed from the standard instruction on the extortion defense approved in the Second Circuit and unlawfully withdrew the issue of intent from the jury.

7. Whether the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963), was violated by the prosecution's concealment, until its opening statement at trial, of the fact that its principal witness had personally embezzled $375,000 of the money allegedly paid by him as a bribe.[1]

STATEMENT

Petitioner is Chairman of the Board of the Ingram Corporation, a company headquartered in New Orleans, Louisiana, and engaged in energy-related activities in various parts of the world. Petitioner and his brother, who was then President of the Corporation, were charged, together with six residents of Chicago, Illinois, whom they did not know, in a 39-count indictment alleging that bribes had been given on behalf of the Ingram Corporation to trustees and employees of Chicago's Metropolitan Sanitary

[1] The reasons for granting a writ of certiorari to review this question are fully stated in the pending petitions in *McPartlin* v. *United States*, No. 78-1751, *Bull* v. *United States*, No. 78-1754, and *Janicki* v. *United States*, No. 78-1755, all filed on May 23, 1979, in this Court. Petitioner adopts the reasons stated in those petitions.

District in connection with the Sanitary District's award and administration in 1971 and 1972 of a contract to transport sewage ("sludge") from Chicago's waste treatment plants to a landfill in downstate Illinois. The prosecution's proof established that payments had been made by William J. Benton, an Ingram Corporation vice-president who was granted immunity from prosecution, to the Chicago officials. From the inception of these proceedings, however, petitioner maintained that while he acceded to the continuation of these payments upon learning that they were being made, he did so only because he had been told by Benton that the Chicago officials were threatening, if "political contributions" were not made, to assess crippling penalties against Ingram Corporation for unforeseen delays in performance.[2] These extortionate threats, if implemented, would have bankrupted the Corporation.

[2] This case is extraordinary because in most circumstances of this kind, where a request for a bribe initiates with a corrupt public official, the party who succumbs to the demand has been treated as a victim rather than as a perpetrator of crime. *See, e.g., United States* v. *Kuta*, 518 F.2d 947 (7th Cir. 1975); *United States* v. *Staszcuk*, 502 F.2d 875 (7th Cir. 1974), *withdrawn in part on other grounds*, 517 F.2d 53 (7th Cir. 1975); *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974); *United States* v. *DeMet*, 486 F.2d 816 (7th Cir. 1973); *United States* v. *Hyde*, 448 F.2d 815 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972); *United States* v. *Addonizio*, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Hall*, 536 F.2d 313 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976).

Indeed, in an interview that appears in the record, the United States Attorney for the Northern District of Illinois who prosecuted this case told a reporter the following:

> . . . if we have to choose between the *businessman who finds that the only way to do business in Chicago is the way it's been done for 50 years—paying public officials*—and the officials who may have been collecting payments for 40 or 50 years, we feel it is better to prosecute the official and get

The trial judge denied pretrial motions by the Ingrams requesting that petitioner and his brother be tried separately from the six Chicago defendants who had extorted the payments from the Corporation and whose potential defenses were squarely antagonistic to the Ingrams. After a joint jury trial of all eight defendants, in which petitioner was denied several opportunities to prove that the Chicago officials had planned an extortionate scheme (*see* pp. 17a-24a, *infra*), petitioner was convicted on 29 counts charging violations of 18 U.S.C. §§ 371 (conspiracy), 1343 (wire fraud), and 1952 (interstate travel in aid of unlawful activities).[3] He was sentenced to serve a prison term of four years.

(1) *The Evidence Against Petitioner*—There was no suggestion whatever in any of the proof that the Ingram Corporation, or any of its officers or employees, initiated any bribe offer or illegal proposal in connection with its bid for the contract to haul Chicago's sludge. Benton, who was the government's chief witness and who had been the main participant representing the Corporation in the negotiation and implementation of the sludge-hauling contract, testified

him out of office even if you have to give immunity to the businessman.

Supplemental Memorandum in Support of Defendants' Motion for a Severance at pp. 3-4, No. 76 Cr. 779 (N.D. Ill. 1977) (emphasis added).

[3] Petitioner's brother was acquitted by the jury which, according to newspaper reports, initially voted 8-to-4 to acquit petitioner. See Appendix A to Petitioner's Motion for a New Trial. The jury deliberated for three days before returning a verdict. The deciding factor against petitioner, according to news stories, was the evidence of his approval of payments, on a totally unrelated matter, to a consultant in Brazil. This is discussed at pp. 9-10, 15-19, *infra*.

that he and other Ingram Corporation employees worked together in March 1971 to submit legitimate written bids on the contract to the Chicago officials (Tr. 706-707).[4] Benton thereafter met in Chicago with Franklin H. Weber, an influential Illinois businessman. Weber told Benton "that in order for a contractor to work in this area, it was necessary that political contributions be agreed to" (Tr. 718). Weber said that the "political contributions" would have to be "about a quarter of a million dollars" (Tr. 718) and that the money was to go to "Mayor Daley's organization" (Tr. 1456; *see* Tr. 1539). Benton testified unequivocally that during the entire period of time that payments were being made to the Chicago officials, the money was always "demanded" by them (Tr. 1455):

> Q. You never suggested it first, did you?
>
> A. No, sir.

A total of $320,000 was allegedly paid by Benton in 1971. All these funds were generated within the Ingram Corporation by Benton, who personally transmitted the money to various of the Chicago defendants. According to Benton, he advised petitioner in 1971 that "the contribution to the Democratic Party in the State of Illinois" would have to be made as a condition for securing the contract (Tr. 718-719).

The Chicago officials demanded additional payments in late 1971 and early 1972. They threatened at that time to assess an enormous liquidated-damages penalty against the Corporation and to withhold the purchase of a pipeline already constructed by the Corporation, which the trustees had assured Benton

[4] "Tr." refers to the transcript of the trial in the district court.

they would purchase (Tr. 978-982, 3894-3896).

The Corporation was then on the brink of bankruptcy, and the Sanitary District's refusal to purchase the pipeline and its assessment of liquidated damages would have deprived the Corporation of funds that were essential to its survival (Tr. 991-995, 1469). In these circumstances, recognizing explicitly that they were the victims of "extortion" (Tr. 4074-4075), the Ingram brothers assisted Benton in 1972 in generating $100,000 in cash which was paid to the Chicago officials (Tr. 1046-1052, 4074-4081). Although the Chicago officials did not then invoke the liquidated damages clause, they continued to withhold the purchase price of the pipeline until a final arrangement was made by Benton, with petitioner's knowledge, for additional payments (Tr. 1254-1259, 3933-3938).

(2) *The Denial of Separate Trials*—On August 9, 1976, little more than a month after the indictment was returned, petitioner and his brother moved for a severance of the charges against them from those against the Chicago defendants. They noted in their supporting Memorandum of Law that their projected defense of extortion created "a 'head-on' conflict between the Ingrams and the other defendants" and cited appellate decisions which had held that a severance should be granted whenever defenses are mutually antagonistic. A subsequent legal memorandum filed by the Ingrams spelled out in greater detail the inherent conflict between the Ingrams' defense that the payments were extorted and the Chicago defendants' claim that no request for bribes was made and no bribes were paid. The trial judge denied the motions to sever and proceeded with a joint trial—the

first, to our knowledge, in which a government employee who is an alleged recipient of a bribe has been tried jointly with a co-defendant who contends that the "bribe" was extorted from him.[5] Apart from the Ingrams' inability, on account of the joint trial, to probe and prove the general propensity of the Chicago officials to demand payments from others who had dealt with the Sanitary District, the joint trial resulted in the exclusion of several specific lines of exculpatory proof offered by petitioner, which are discussed in the opinion at pp. 17a-24a, *infra*.

(3) *The Introduction Against Petitioner of Prejudicial Evidence of "Other Crimes, Wrongs, or Acts"*—After petitioner testified in his own defense that he approved the payments to the Chicago officials only as a result of extortion, the prosecution was permitted, over petitioner's repeated objections, to cross-examine and to introduce extensive evidence relating to petitioner's knowledge and approval of payments made by the Ingram Corporation between 1969 and 1973 to a Brazilian petroleum engineer named Levindo Caniero (Tr. 3990-3994, 5673-5683). Caniero was a private citizen whose employer, Petrobas, was a Brazilian oil company owned jointly by private parties in Brazil and by the Brazilian government. The evidence showed that Caniero gave the Ingram Corporation advice and information on bidding for a Pe-

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[5] The court of appeals implied that *United States* v. *George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973), was such a case (p. 15a, *infra*). But *George*—which was not a bribery case—did not concern a co-defendant's claim of extortion, and the court of appeals held in that case that the defenses were not, in fact, antagonistic at all because both defendants agreed that the illegal proposal—that "kickbacks" be paid—was initiated by one of them. 477 F.2d at 515.

trobas contract in Brazil, and he was paid with funds deposited in a Swiss bank account maintained on his behalf. There was not a scintilla of evidence that the payments to Caniero were illegal or otherwise impermissible under the law of Brazil. Nonetheless, in his summation the prosecutor declared that petitioner "had set up a Swiss bank account so that *bribes* could be paid to Levindo Caniero" (Tr. 6141; emphasis added). And the jury apparently gave dispositive weight to this highly prejudicial, but substantially irrelevant, testimony. See note 3, *supra*.

(4) *The "Travel Act" Instruction*—Overruling petitioner's objection, the trial judge instructed the jury, with reference to the counts charging violations of the "Travel Act," 18 U.S.C. § 1952, that the prosecution (Tr. 6665)

> need not prove the defendant either knew or could foresee that interstate travel would occur or that an interstate facility would be used.

The judge reaffirmed this instruction in distinguishing the "Travel Act" counts from the counts charging wire fraud (18 U.S.C. § 1343) and noted again that for purposes of 18 U.S.C. § 1952 "a defendant need not know or reasonably foresee that the facilities of interstate commerce will be used or someone will travel in interstate commerce" (Tr. 6670). The jury found petitioner guilty on 15 counts alleging violations of the "Travel Act."

(5) *The Jury Instructions on the Elements of the Extortion Defense*—Rather than giving the jury the instruction regarding the Ingrams' extortion defense which had been approved in federal appellate rulings

and in the leading treatise on jury instructions,[6] the trial judge devised a complex, ten-paragraph instruction of his own (reproduced in the opinion below at pp. 25a-27a, *infra*) which directed the jury to reject the defense if it found the government to have established any one of five different propositions formulated and discussed in the instruction.

Petitioner objected to this instruction in writing and orally on various grounds (including those specified on appeal) and proposed three different sets of instructions which closely followed those which had been judicially and authoritatively approved. The judge's instruction effectively withdrew from the jury the element of intent and virtually assured the jury's rejection of the extortion defense. The trial judge rejected all the offered instructions and refused to alter his own.

(6) *The Court of Appeals' Opinion*—In affirming petitioner's conviction, the three judges of the court of appeals issued an unusual consolidated, but separately authored, opinion which appears at every opportunity to trivialize the substantial criminal-justice issues presented by petitioner's appeal. One circuit judge, who dealt with the issues of severance, declared that the defenses of the Ingrams and the Chicago residents were only antagonistic "to a degree" because "it was possible" that Benton, the Ingram Corporation representative on the scene, had *never* made any payments at all to the Chicago defendants but had kept all of the $527,000 himself (p. 14a, *infra*). He therefore relegated to a footnote the long-standing prophylactic rule regarding severance described in the *ABA Minimum Standards for Criminal Justice: Standards Relating to Joinder and Severance* (Approved

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[6] 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 34.10 (1977).

Draft 1968), and he cited authorities which did not deal with the situation in which the defenses presented are unalterably and squarely antagonistic (p. 16a, n. 11, *infra*).

Another judge discussed the admissibility of the "prior crimes or acts" evidence relating to the Brazilian consultant. He ignored the unfairness of having the outcome of criminal charges in the United States turn on the superimposition of American moral standards upon conduct which may be entirely lawful in a foreign country. He declared the court "loath to assume" that "surreptitious payments" were "a common and accepted practice in Brazil," condemned petitioner's "facile and unsupported characterizations of Brazilian practice," and—inverting the established burden of proof in criminal cases—said that petitioner "admits" that he (as well as the prosecution) had offered no proof on Brazilian standards. On the startling premise that an individual who authorized lawful payments in a foreign country "is more likely" to authorize bribes in the United States, the circuit judge concluded that petitioner's dealings with Caniero were relevant to the charges in the indictment.

The court of appeals recognized the great prejudicial impact of the proof, but nevertheless held that it had no duty to weigh the prejudice of the evidence against its relevancy. The circuit judge said that since this decision was "highly judgmental," the appellate court would not "restrike the balance ourselves but instead would examine *only the manner in which the district court exercised its discretion*" (pp. 39a-40a, *infra*; emphasis added). Concluding that the trial judge was "meticulous and deliberate," the court affirmed the admissibility of this proof.

The court below similarly minimized petitioner's challenge to the trial judge's unprecedented "extortion defense" instruction. Petitioner had argued below that by erecting the five sequential hurdles included in this jury instruction—at least three of which were misleading and patently erroneous—the trial judge had deprived petitioner of his entire defense. Rather than comparing the instruction with those which were submitted by petitioner and with instructions which had been judicially approved and which fairly stated the defense, the circuit judge hypothesized possibilities under which the jury might conceivably have overcome the confusing elements of the instruction. The opinion did not provide any legal or policy justification for the "loss-gain distinction" in the instruction or for the requirement that petitioner establish that he honestly believed he had "legal entitlement" to the benefits which the Chicago officials were providing. The court's affirmance was then buttressed by erroneous assertions that petitioner's objections had not been properly preserved.[7]

REASONS FOR GRANTING THE WRIT

This case raises several important recurring questions relating to the fair administration of criminal justice in the federal courts. These issues have divided trial and appellate courts in the very recent past, and

[7] The opinion of the court below refers only to petitioner's written objections to the judge's instruction and overlooks the oral objections made by petitioner's counsel. Petitioner's counsel objected orally, for example, to the "legal entitlement" element of the instruction at Tr. 6009-6010. Indeed, the prosecution did not claim in the court of appeals that the objections had not been preserved. This assertion came from the court of appeals *sua sponte*.

they continue to affect the day-to-day decisions of prosecutors and federal judges. The court of appeals' resolution of various of these issues conflicts with rulings of other federal courts faced with similar circumstances. The action recently taken by at least one circuit in considering one of these trial issues *en banc* manifests the uncertainty which has afflicted lower courts. Since the Seventh Circuit's ruling in this case conflicts with the principle announced *en banc* by the Fifth Circuit, inconsistency among the circuits in similar trial situations is likely to result if the lower court decision is permitted to stand.

Moreover, the decision below perpetrates an injustice upon a highly respected Louisiana businessman who faces a four-year prison term for having yielded to unlawful extortionate demands made to an officer of his corporation. The corporation was seeking to do business with a city with whose practices and traditions it was totally unfamiliar, but whose reputation made the extortionate threats and demands entirely credible.

1. Confusion and Conflict over the Application of Rules 404(b) and 403 of the Federal Rules of Evidence

By approving the prosecution's use against petitioner of evidence that he had authorized unrelated "surreptitious" payments to be made abroad to a Brazilian national, the court of appeals has carried the limited exception provided in Rule 404(b) far beyond the intent of its draftsmen and beyond the cases interpreting that Rule. The court has thereby opened the door for inferences of criminal intent and culpability to be drawn against responsible officers associated with leading multinational corporations on the basis of acts that, at least until recently, have been regarded as a necessary and acceptable way of doing business abroad. And by abdicating totally its own duty to weigh the prejudice caused by the admission of such evidence against its probative value, the court below has struck a new standard for appellate review of these evidentiary rulings which conflicts with the standard of review applied in virtually every other circuit.

(a) *The merits.*—Rule 404(a) of the Federal Rules of Evidence forbids the prosecution in a criminal case from introducing evidence of an accused's bad character. Subsection (b) of the Rule carves out a limited exception for proof of "other crimes, wrongs, or acts" which bear upon states of mind such as "motive, opportunity and intent." The court below erroneously concluded that petitioner's authorization of payments to a well-situated Brazilian national in connection with a foreign contract could be admitted under subsection (b) to prove a criminal intent to bribe in the United States. In doing so, the court applied a test that has been rejected by other courts of appeals and that eviscerates the Rule.

The court below interpreted Rule 404(b) to permit the introduction of evidence relating to any prior crime or wrongful act whenever it can be said that such evidence makes the intent to commit the charged offense "more likely" than if no such prior act had been committed. It expressly dispensed with any requirement that the prosecution demonstrate that the foreign payment was either illegal or violative of Brazilian business standards. Reasoning that a person who has made "facilitating payments," whether legal

or illegal, to a foreign businessman is "more likely" to have the intent to give a bribe than someone who has not made such payments, the court of appeals ruled that petitioner's authorization of the Brazilian payment satisfied Rule 404(b) (p. 37a, *infra*).

No decision cited by the prosecution or by the court below supports this proposition, and many decisions refute it.[8] The "more likely" standard has been rejected by many courts of appeals in reversing a trial court's admission of evidence far more probative of guilty intent than the foreign payment in this case. For example, in *United States* v. *James*, 555 F.2d 992 (D.C. Cir. 1977), the accused's presence at a narcotics transaction and his arrest in an apartment containing substantial quantities of heroin was logically relevant to whether he was a distributor of narcotics on an earlier occasion. Nonetheless, the court of appeals reversed a conviction in which this evidence had been introduced with an explicit rejection of the "more likely" standard applied by the court below (555 F.2d at 1000; emphasis added; footnote omitted):

> The issue thus resolves itself into whether James' presence in an apartment in which were found substantial quantities of heroin is probative of an intent to distribute other heroin sixteen days earlier. Granting that a person found in that

[8] Contrary to the belief of the court below, the decision of the Fourth Circuit in *United States* v. *Baggett*, 481 F.2d 114 (4th Cir.), *cert. denied*, 414 U.S. 1116 (1973), does not stand for this rule. The evidence in that case related to a course of conduct of favors and gifts flowing from [the alleged briber] to Baggett" and "receipt by Baggett of favors from others who had received favorable zoning rulings." In other words, the evidence established the close relationship between the parties to the bribe and proved a number of other *unlawful* receipts of gratuities in exchange for zoning favors.

> situation *might be more likely so to contemplate*, such an inference is so weak as to bring into serious question whether its contribution to the accuracy of the trial process outweighed the likelihood that its dramatic flavor would derange it.

Other federal courts of appeals have followed the same course and reversed convictions where the extrinsic evidence relating to intent admitted under Rule 404(b) was of only minimal probative value even though it made criminal intent "more likely" than if no such evidence existed. *See United States* v. *Jones*, 570 F.2d 765 (8th Cir. 1978); *United States* v. *Cook*, 557 F.2d 1149 (5th Cir. 1971); *United States* v. *Cook*, 538 F.2d 1000 (3d Cir. 1976); *cf. United States* v. *O'Connor*, 580 F.2d 38 (2d Cir. 1978).

The Seventh Circuit's ruling in this case conflicts most clearly with the Fifth Circuit's recent *en banc* decision in *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978). *Beechum* involved a prosecution for mail theft in which the government sought to negate, by introducing evidence of an extrinsic offense, the defendant's claim that he lacked the intent required for the offense. The trial court admitted the evidence and the defendant was convicted. On appeal the Fifth Circuit *en banc* engaged in a painstaking review of the law both before and after the adoption of Rule 404(b). Based on this review it held that proof of the accused's participation in other crimes may be offered to establish criminal intent only if "the extrinsic offense requires *the same intent* as the charged offense . . ." (582 F.2d at 913; emphasis added). On the facts, the Fifth Circuit affirmed the trial court because the extrinsic offense proved was *identical* to that with

which the defendant was charged—*i.e.*, mail theft. On the facts of this case, the Fifth Circuit plainly would have reversed. There is nothing in the record to suggest that petitioner's authorization of a payment to a Brazilian national was an offense requiring "the same intent" as bribery of a public official in the United States. In fact, the transfer of these funds was no more relevant to petitioner's criminal intent than any lawful transfer made in or outside the United States.

The reasoning of the court below not only conflicts with established law in other circuits, but it plainly eviscerates Rule 404(b). The first sentence of that Rule flatly prohibits admission of evidence of "other crimes, wrongs, or acts . . . to prove the character of a person in order to show that he acted in conformity therewith." The rationale of the court of appeals for admission of the evidence in this case (p. 37a, *infra*; emphasis added) was that

> one making such [foreign] payments, *legal or not*, is more likely to have the intent to influence official action by similar payments in other instances than one who has never made such payments.

If that is a correct statement of Rule 404(b)'s exception for "other crimes" evidence bearing on intent, then the prohibition against admission of such evidence to show character is mere exhortation.

So long as the decision below stands, an issue that now arises in many federal criminal prosecutions—particularly in cases involving "white collar crime" where intent is usually a contested fact—will not be resolved uniformly and fairly throughout the circuits.

This Court has given no guidance on the subject of the admissibility of other acts committed by an accused which may bear on his state of mind since the 1948 decision in *Michelson* v. *United States*, 335 U.S. 469, 475-76 (1948). As a result, identical evidence may be admissible in a criminal trial in federal court in one area of the country and excluded in another. Had Mr. Ingram been prosecuted in the Fifth rather than the Seventh Circuit, he might well be a free man today.

(b) *The standard for appellate review*—The court below also took a narrow and erroneous view of its duty of review on appeal. The Advisory Committee's Note on Rule 404(b) states that evidence which might otherwise be admitted under Rule 404 to prove motive or intent should be excluded if "the danger of undue prejudice outweighs the probative value of the evidence, in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." The legal judgment involved in this balancing must be made by the trial court initially, but its validity must be determined by the court which reviews the final judgment. Numerous cases demonstrate that federal courts of appeal must make an independent appraisal of these factors, even while granting substantial latitude to the discretion of the trial judge, and must reverse convictions where the balance has not been appropriately struck. *See, e.g., United States* v. *Back*, 588 F.2d 1283 (9th Cir. 1979); *United States* v. *Herman*, 589 F.2d 1191 (3d Cir. 1978); *United States* v. *Mann*, 590 F.2d 361 (1st Cir. 1978); *DeVore* v. *United States*, 368 F.2d 396 (9th Cir. 1966); *cf. United States* v. *Halper*, 590 F.2d 422, 431 (2d Cir. 1978).

In this case, the court below refused to weigh the prejudice of the proof relating to the payment to Caniero against its legitimate usefulness in the case. Instead, it said that it would "examine only the manner in which the district court exercised its discretion" (pp. 39a-40a, *infra*). The court of appeals offered no authority for the proposition that its function in reviewing determinations under Rule 403 is to ascertain that the district court was "meticulous and deliberate" in its consideration of the issue (p. 40a *infra*), rather than to examine the merits of the determination. Had the court of appeals properly considered the issue, it could not have responsibly reached any conclusion other than reversal of petitioner's conviction. The Second Circuit has accurately noted the increasing use of "other crimes" evidence in federal criminal trials and the need for courts of appeals "if not to 'stem the tide' at least to define its limits." *United States* v. *Halper*, 590 F.2d at 432. The decision of the court of appeals in this case has precisely the contrary effect, and review by this Court is essential to restore the proper function of appellate courts in this area.

2. Uncertainty as to Pretrial Severance of Co-defendants with Antagonistic and Irreconcilable Defenses.

The decision of the court below appears to be the first reported case in which alleged recipients of bribes who deny having taken any payments have been tried together with those who claim that the bribe-takers extorted money from them.[9] Plainly, these two defen-

[9] Indeed, in most cases, as we have previously noted, those from whom a bribe is demanded are not charged at all. See note 2, *supra*. Where the association between briber and bribee is a longstanding one, so that the giver and taker appear to have developed an illicit relationship, both have been charged. But even in such situations, severances have been granted on even the slightest showing of antagonism in the defenses. *See, e.g., United States* v. *Rocks*, 481 F.2d 112 (4th Cir.), *cert. denied*, 414 U.S. 1044 (1973); *United States* v. *Baggett*, 481 F.2d 114 (4th Cir.), *cert. denied*, 414 U.S. 1116 (1973).

ses are "completely antagonistic" within the meaning of *United States* v. *Johnson*, 478 F.2d 1129, 1131 (5th Cir. 1973), in which the court held that a pretrial motion on grounds of antagonistic defenses should have been granted. On the evidence introduced at trial no jury could possibly have credited the only version of the facts the court below was able to devise to render the defenses "not necessarily antagonistic"—*i.e.*, that Benton had falsely been reporting to the Ingrams that he was being extorted by the Chicago defendants, while actually keeping all the funds himself (p. 14a, *infra*). It was important to petitioner's defense to show that both he and Benton believed Ingram Corporation was being extorted by the Chicago defendants, while it was essential for the Chicago defendants to show that Ingram Corporation not only was not being extorted, but in fact was not making any payments. This trial was, therefore, much like the one described in *People* v. *Braune*, 368 Ill. 551, 557, 2 N.E.2d 839, 842 (1936), in that it was "in many respects more of a contest between the defendants than between the people and the defendants."

The American Bar Association's *Minimum Standards for Criminal Justice: Standards Relating to Joinder and Severance* 41 (Approved Draft 1968), declared unequivocally that

> it has long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other.

This long-standing rule has been applied in dozens of jurisdictions, as is evidenced by the list of cases discussed and cited in the almost 100-page Annotation, "Antagonistic Defenses as Ground for Separate Trials of Co-defendants in Criminal Case," 82 A.L.R. 3d 245-343 (1978). Particularly when, as was true here, the defenses "were irreconcilable as well as mutually exclusive," the consistent federal rule should be that a pretrial severance must be granted. *United States* v. *Crawford*, 581 F.2d 489, 491-492 (5th Cir. 1978). The ruling of the court below on this question conflicts, therefore, with the Fifth Circuit's decisions in both *Johnson* and *Crawford*.

Nor is it a sufficient response simply to rely on the broad discretion given to the trial judge over matters such as severance. That discretion might be applicable if the issue were whether an unanticipated incident during trial required a severance of defendants. But the question presented here relates more to the pretrial stages, when a trial judge is in no better position than an appellate court to weigh the competing interests. It is appropriate that this Court issue a rule under its supervisory jurisdiction for the federal judiciary that when defendants demonstrate before trial that their defenses will be "completely antagonistic," "irreconcilable," and "mutually exclusive"—such as when one of the defendants contends that the other extorted an impermissible payment from him—the principle approved by the American Bar Association should govern, and a severance should be granted.

3. Conflict over Jury Instructions Regarding Intent Needed to Violate the "Travel Act"

The trial judge's jury instruction that petitioner could be convicted under 18 U.S.C. § 1952 without knowing or reasonably foreseeing that the facilities of interstate commerce were to be used in executing the unlawful scheme conflicts squarely with the decision of the Court of Appeals for the Sixth Circuit in *United States* v. *Prince*, 529 F.2d 1108 (6th Cir.), *cert. denied on other issues sub nom. Pandelli* v. *United States*, 429 U.S. 838 (1976). In the *Prince* case, the Sixth Circuit considered the effect of this Court's decision in *United States* v. *Feola*, 420 U.S. 671 (1975)—on which the court below relied—and it concluded that *Feola* did not require the Sixth Circuit to overrule its own 1967 decision in *United States* v. *Barnes*, 383 F.2d 287 (6th Cir. 1967), *cert. denied*, 389 U.S. 1040 (1968), which had held that knowledge of interstate travel was an essential element of the offense defined by the "Travel Act." Thus it is clear that if this case had been tried in the federal court in Ohio or Kentucky, rather than in Illinois, petitioner's convictions under the Travel Act and the conspiracy statute would have been reversed. This Court should resolve that conflict.

4. Conflict Regarding the Elements of the "Extortion Defense"

The courts have recognized that a defendant charged with bribery may defend on the ground that he was coerced into paying the bribe, since evidence of extortion negates the intent necessary to constitute the crime of bribery. The established extortion-as-a-

defense instruction, set out in 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 34.10 (1977), is based on the Second Circuit opinions in *United States* v. *Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), and *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Although the court below paid lip-service to an earlier *Barash* decision, *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966), it ignored the established precedents. The convoluted jury instructions it approved and delivered effectively withdrew the issue of intent from the jury's consideration.

Three aspects of the instruction were particularly devastating to petitioner's defense and were inconsistent with reason and precedent. *First* was the distinction drawn by the trial judge between fear of an "economic loss" (which, he said, could be grounds for a defense) and anticipation of an "economic advantage" (which could *not* be the basis for a defense). In an analogous case, the Court of Appeals for the First Circuit said that "inquiry into the kind of economic interest at stake is of little significance," and that the "proper focus" should be on whether a victim's interest "was sufficient to give rise to fear." *United States* v. *Hathaway*, 534 F.2d 386, 395 n.6 (1st Cir. 1976). If petitioner was motivated by fear of economic loss, it should make no difference whether the harm was denial of an anticipated profit on which the Corporation's future depended (an "economic advantage") or the assessment of liquidated damages (an "economic loss") which would cripple its ability to continue in business.

The *second* wholly unjustified aspect of the instruction was its distinction between a benefit to which the

Corporation was "legally entitled" and one to which it had no "legal entitlement." According to the trial judge, the extortion defense could only be based on the former. This principle of "legal entitlement" does away with the extortion defense in any situation in which a government official threatens to deprive a private citizen of a discretionary benefit unless he is paid a bribe. It plainly conflicts with the decision of the Second Circuit in *United States* v. *Kahn*, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). The defendant in *Kahn* was seeking a cable television franchise—plainly a benefit which was entirely discretionary and to which he was not "legally entitled." Yet the extortion defense was submitted to the jury and approved by the Second Circuit.[10] Moreover, the "legal entitlement" element was particularly prejudicial in this case because petitioner had admitted during trial "that he had no legal entitlement to the benefits which his payments were designed to obtain." Hence, according to the court below, he was "absolutely precluded from prevailing on an extortion defense" (pp. 31a-32a, *infra*).

The same preclusion resulted from the *third* erroneous element injected into the extortion defense by the trial court—the definition of extortion which equated it, for all practical purposes, with duress by permitting acquittal only if petitioner was deprived of "free choice." The Second Circuit in *Barash* clearly distinguished between the defense of duress or involuntariness, which is available for a great variety of

[10] Compare also *United States* v. *DeMet*, 486 F.2d 816 (7th Cir. 1973), in which an extorting public official demanded a payment for privileges to which the victim "was not lawfully entitled." 486 F.2d at 819. Nonetheless, a Hobbs Act conviction was affirmed.

criminal charges, and the extortion defense, which applies only to crimes such as bribery that require proof of specific intent. *See* 365 F.2d at 401-402. The instruction in this case drew no such distinction, and it thereby conflicted with the Second Circuit's view of the nature of this defense.

Overall, the instructions denied petitioner a fair opportunity to have the jury evaluate the intent with which he acted. Only last Term, in reaffirming the cardinal tenet that "intent generally remains an indisputable element of a criminal offense," this Court cautioned that "the decision on the issue of intent must be left to the trier of fact alone." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437, 446 (1978). This rule surely applies if an accused's exclusive defense is that he lacked the intent to commit the offense because he was subjected to criminal threats to perform the unlawful act. Yet in this case, the issue of intent was effectively withdrawn from the jury's consideration by the improper instruction.

This Court's very recent ruling in *Sandstrom* v. *Montana*, No. 78-5384 (decided June 18, 1979), reaffirmed the importance of a jury's independent determination of an accused's state of mind. The intricate jury instruction given by the trial judge in this case had the same effect as the instruction struck down in *Sandstrom*—"the burden was shifted to the defendant to prove that he lacked the requisite mental state." This was plainly impermissible.

CONCLUSION

This case presents several pressing issues relating to the administration of criminal justice in the federal courts. By granting this petition for a writ of certiorari, this Court will have the opportunity to clarify many matters of trial procedure which are now confusing and splitting the lower courts. The petition for a writ of certiorari should, accordingly, be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 77-2258, 77-2259, 77-2274, 77-2275 and 77-2280

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT MCPARTLIN, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76 CR 779—John F. Grady, *Judge.*

ARGUED SEPTEMBER 29, 1978—DECIDED MARCH 26, 1979

Before PELL, SPRECHER and TONE, *Circuit Judges.*

TONE, Circuit Judge.

The appellants were convicted, in a nine-week jury trial, of conspiring to violate the wire and travel fraud statutes and of substantive violations of those statutes.

The indictment charged that defendant Frederick B. Ingram,[1] chairman of the board of the Louisiana-based Ingram Corporation, had paid defendant Robert F. McPartlin, an Illinois legislator, defendant Valentine Janicki,

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[1] We use the spelling of Ingram's first name that appears in the indictment (Frederick) rather than the spelling that appears in his brief (Frederic).

a trustee for the Metropolitan Sanitary District, and others more than $900,000 to secure for the Ingram Corporation a multi-million dollar sludge-hauling contract with the District. Defendants Franklin H. Weber, a businessman, and Edwin T. Bull, president of a towing company, were alleged to be intermediaries through whom many of the payments were made. William J. Benton, vice president of Ingram Corporation, was an unindicted co-conspirator who played a major role in the conspiracy and testified as a witness for the prosecution. The defendants were convicted of numerous violations of the Travel Act, 18 U.S.C. § 1952, and the Wire, Radio, Television Fraud Act, 18 U.S.C. § 1343, and of conspiring to violate those acts in violation of 18 U.S.C. § 371. The jury acquitted three other defendants, E. Bronson Ingram, brother of Frederick B. Ingram and an officer of Ingram Corporation, Chester Majewski, a Metropolitan Sanitary District trustee, and Bart T. Lynam, General Supervisor of the Sanitary District.[2]

The defendants urge as grounds for reversal the district court's denial of motions for severance, a ruling on the alleged withholding by the prosecution of evidence favorable to the defendants until the beginning of the trial, rulings admitting and excluding evidence, certain instructions to the jury, and other alleged trial errors. In this portion of the opinion the facts are stated and the issues arising from the denial of severance are decided. Judge Pell and Judge Sprecher have written, and I concur in, the portions of the opinion dealing with the other issues.

The Facts

The Sanitary District is a municipal corporation with

[2] The indictment also charged appellants McPartlin, Weber, and Janicki with filing false income tax teturns in violation of 26 U.S.C. § 7206(1). The tax counts against McPartlin and Weber were dismissed before trial. Janicki was convicted of tax violations, but raises no issue on appeal with respect thereto.

primary responsibility for disposing of sewage from Chicago and surrounding areas. The District's business is governed by an elected Board of Trustees[3] and managed by a professional staff, which from time to time makes recommendations to the Board concerning major undertakings of the District.

The Sanitary District operates a sewage treatment plant in Stickney, Illinois. Until 1971 the sludge produced as a by-product was disposed of by pumping it into nearby lagoons. Early that year, because the lagoons were rapidly being filled and efforts to clean them had failed, the District announced plans to have the sludge transported to Fulton County, Illinois, about 160 miles southwest of Stickney, and solicited bids on the project, which were due on March 19, 1971.

Viewed in the light most favorable to the prosecution, the evidence showed that Benton, acting with the knowledge and complicity of Frederick Ingram and through intermediaries Bull and Weber, bribed McPartlin and Janicki to cause the sludge-hauling contract to be awarded to Ingram Corporation and one of its subsidiaries, and later bribed the same officials to secure favorable treatment under the contract and modifications of the contract. The details were as follows:

When the District solicited bids on the sludge-hauling project, defendant Bull assisted Frank Oberle, an employee of Ingram Contractors, Inc., a wholly owned subsidiary of Ingram Corporation, in investigating the new proposal. During the week before the bids were to be submitted, Bull visited Robert Howson, a vice president of Ingram Contractors, Inc., in New Orleans, Louisiana, and told Howson that if Ingram Corporation expected to secure the contract, it would have to make a "political contribution."

[3] In 1975 the name was changed to "Board of Commissioners."

Howson responded that he was not in that sort of business, but then took Bull to meet William J. Benton, vice president of Ingram Corporation and president of Ingram Contractors, Inc.

Ingram Corporation, Burlington Northern, Inc., and the Atchison, Topeka and Santa Fe Railway Company were the leading contenders among those submitting bids on March 19, 1971. To negotiate with these three bidders, the Sanitary District established a committee, which met with representatives of the bidders for the first time on March 23, 1971.

That evening Bull, Oberle, and Benton met in Benton's hotel room, where they were later joined by defendant Weber. After Bull had introduced Weber to Benton, Bull and Oberle left the room. Weber then told Benton that if Ingram Corporation wanted the sludge-hauling contract, it would have to make a $200,000 "political contribution." Benton replied that he would have to get approval from his superiors. After agreeing to meet Benton the next day, Weber left.

Benton then telephoned defendant Frederick Ingram to inform him of Weber's "political contribution" proposal. Ingram agreed, provided that the contribution could be added to the cost of the contract.

On March 24, 1971, Benton again met with Bull, who expressed his belief that if the Ingram Corporation accepted Weber's proposal, it would get the contract. Bull also told Benton that if the corporation did get the contract, he wanted $100,000 in addition to anything it paid Weber. At another meeting later in the day, Weber asked Benton to open an account at a Chicago bank to demonstrate Ingram Corporation's "good faith." That same day Benton opened an account at the First National Bank of Chicago.

The following week, Weber called Benton and told him that Burlington Northern, Inc. had offered to make a

$295,000 political contribution. According to Weber, it was therefore necessary for Ingram Corporation to raise its contribution to $450,000, including a $150,000 cash payment before the contract was awarded. Again Benton consulted Frederick Ingram, who again agreed on condition that the contribution could be added to the contract price. Benton communicated Ingram Corporation's approval to Weber, but said that the corporation could not raise $150,000 in cash on such short notice. Weber replied that some of the $150,000 had to be paid by April 3, 1971.

On April 3, 1971, Weber and McPartlin went to Benton's Chicago hotel room, where Weber introduced McPartlin to Benton as the man who handled all political contributions for the Democratic Party in Illinois. McPartlin assured Benton that Ingram Corporation would receive at least $21,500,000 in total revenue from the sludge-hauling contract. Benton gave McPartlin $75,000 in cash, including several one thousand dollar bills. On April 6, 1971, Weber deposited nine one thousand dollar bills in the account of one of his defunct corporations, Illinois Southern Materials.

On April 6, 1971, Weber telephoned Benton, asking for $25,000 in cash immediately to secure the cooperation of three Sanitary District staff members. When Benton protested that he could not deliver $25,000 cash on such short notice, Weber suggested that Ingram Corporation issue a check in that amount to Bull Towing Company, which Benton caused to be done the next day. On April 8, 1971, Edwin Bull deposited the Ingram check in the account of Bull Towing Company and, at the same time, withdrew $25,000 in cash from the account.

The Sanitary District requested the three bidders on the sludge-hauling contract to submit new bids by April 15, 1971. Santa Fe declined. Burlington Northern submitted a revised bid of $18,300,000. Oberle submitted Ingram Corporation's revised bid of $16,990,000 after which he

returned to his hotel room, where he received a telephone call from either Benton or Weber.[4] The called instructed him to go to the bar at the Continental Plaza Hotel to meet defendant Janicki, which Oberle did. At the meeting in the bar Janicki told Oberle to raise Ingram's revised bid to $17,990,000. Oberle then returned to his hotel room and telephoned Benton for advice. Benton instructed Oberle to attend the Sanitary District negotiating committee meeting scheduled for that afternoon. While attending the meeting, Oberle received telephone instructions from Benton to raise the Ingram bid by $1,000,000 to $17,990,000. Oberle did so.

On April 22, 1971, the Sanitary District Board of Trustees voted to award the contract to Ingram Corporation. Between that date and May 12, 1971, a contract was drafted by members of the Sanitary District staff and Ingram Corporation representatives, including John Donnelly, president of Ingram Barge Company, the Ingram Corporation subsidiary that would transport the sludge under the contract. The staff insisted on a liquidated damages clause authorizing the District to prescribe the amount of sludge to be transported in any 24-hour period and providing that Ingram Corporation would be assessed a penalty for each ton of sludge not transported, as prescribed, in any 24-hour period. Donnelly, after initially refusing to agree to the provision, discussed it with Benton, who told him to agree to it. Only after talking with Frederick Ingram, however, did Donnelly accede to inclusion of the liquidated damages clause.

The contract provided that Ingram Corporation would construct additions to the treatment facilities at Stickney and an unloading dock and pump station in Fulton County for which work the Sanitary District was to pay $733,000.

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[4] Since Benton did not meet Janicki until a month later, the caller was probably Weber.

Ingram Corporation was also to construct a pipeline over property not owned by the District, for which construction the District agreed to pay $68,000 per month for 36 months, a total of $2,448,000. The contract also provided that Ingram Corporation would receive $1.802 per ton of sludge hauled from Stickney to Fulton County. The parties estimated that over the life of the contract 8,000,000 tons of sludge would be transported.

On May 19, 1971, Weber and Benton met in New Orleans to discuss ways of increasing Ingram Corporation's total revenue under the contract to the $21,500,000 that McPartlin had assured Benton would be forthcoming. Weber told Benton that Janicki and he thought that the corporation could receive an additional $2,100,000 by billing the Sanitary District a second time for the construction of the pipeline and the construction in Fulton County.

On June 26, 1971, Weber told Benton that Janicki needed $21,290 to pay off three District staff members. Ingram issued a check for that amount to Southwest Expressway, another of Weber's defunct corporations.

On July 27, 1971, Weber issued a $20,000 check to Bull Towing Company. Edwin Bull deposited the check and, at the same time, withdrew $20,000. The next day, the Illinois Commerce Commission granted Ingram Corporation's request for a certificate of convenience and necessity.

On August 14, 1971, Edwin Bull negotiated two contracts with Ingram Corporation. In one of them Ingram Corporation agreed to rent barges from Bull Towing Company to transport sludge from the Lemont Bridge over the Illinois River to Fulton County. Donnelly signed this contract but refused to sign the other contract, under which Ingram Corporation would agree to pay Bull $.17 per ton for transporting sludge from Stickney to the Lemont Bridge. Ten cents per ton were intended as payment for actual towing services; the other seven cents per ton were

intended as payment for consulting services and engineering and feasibility studies that Bull had allegedly performed for Ingram Corporation. The second contract also provided for payment to Bull of a $76,000 "finder's fee."[5] Donnelly objected to the "finder's fee," questioned whether any consulting services or studies that Bull provided to Ingram Corporation were worth $560,000, and questioned Bull's competence as a barge operator. Out of Bull's presence, Benton told Donnelly that if Bull did not participate in the sludge-hauling contract, there would be no contract. Donnelly still refused to sign the second Ingram-Bull contract, but permitted Benton to sign it on behalf of Ingram Barge Corporation as well as Ingram Corporation.

On August 15, 1971, Benton, Weber and McPartlin met in Chicago to discuss further payments. Benton agreed to provide $146,000 in two installments. On August 18, 1971, Oscar Hardison, comptroller of Ingram Corporation, delivered $30,000 in cash to Weber at O'Hare Airport in Chicago. On August 28, 1971, another Ingram executive, G. Glen Martin, gave Weber $116,000, which consisted of $46,000 in cash and $70,000 in checks payable to Weber's defunct corporations.

Ingram Barge Corporation began transporting sludge six days later than the date it was required to do so under the sludge-hauling contract; whereupon the Sanitary District assessed liquidated damages of $30,000 under the liquidated damages clause. In early October, 1971, Benton, Weber, and Janicki held a meeting in Chicago to discuss this matter, following which the Sanitary District withdrew the assessment. After the meeting, Weber told Benton that Janicki wanted $100,000 by the end of 1971. When informed by Benton of this request, however, Frederick Ingram refused, saying that no more payments would be made until the Sanitary District began making payments on the pipeline, as Weber had promised it would.

[5] Benton testified that Bull had informed him that he needed money to pay income taxes on the money that he had laundered through Bull Towing Company. Part of the $76,000 was for this purpose, but the government concedes that part of the $76,000 finder's fee was legitimate.

On December 15, 1971, Weber telephoned Benton to tell him that the Sanitary District would issue a check to Ingram Corporation for $1,000,000, as partial payment on the pipeline. When Benton arrived at Janicki's office the following day, however, Janiciki disclaimed any knowledge of the $1,000,000 check. Benton threatened to "jerk the rug" from under everyone in Chicago.

Upon learning of Benton's threat, Weber informed Oberle of it and asked Oberle to do whatever he could about Benton. Oberle telephoned defendant Frederick Ingram to tell him of Benton's threat. Ingram expressed no surprise, simply thanked Oberle for the information and hung up, and later in the day met with Benton to discuss the matter. At the meeting they agreed that Benton would continue to represent Ingram's interest in dealing with the Chicago officials.

On December 21, 1971, Weber, Janicki, and Benton met in Benton's hotel room in Chicago. Benton apologized for his threat. He then gave Weber two checks payable to Weber's defunct corporations in the amount of $50,070. This payment brought Ingram's total contribution to $317,320, levaing a balance of $132,680 on the $450,000 commitment.

In February, 1972, Weber told Benton that because of the difficulties in getting the Sanitary District to pay the additional $2,100,000 for the pipeline, Ingram Corporation would have to increase its contribution to $620,000. On February 17, 1972, Weber asked Benton for $100,000 in cash immediately. When Benton told defendant Ingram of the request, Ingram responded that he would investigate

ways of raising the money. On February 28, 1972, Benton delivered $100,000 to Mrs. Valentine Janicki.

At trial, defendant Frederick Ingram contended that he did not learn until this February, 1972 meeting with Benton that his company had secured a multi-million dollar contract by paying more than $300,000 to Chicago officials.[6] Ingram testified that he protested against paying the bribes, but reluctantly agreed when Benton informed him that if he refused to pay, the Sanitary District would not pay the additional $2,100,000 for the pipeline and would use the liquidated damages clause to penalize Ingram Corporation.

On March 10, 1972, Weber told Benton that if Ingram Corporation could deliver $100,000 before the end of the month, the Sanitary District Board of Trustees would approve the purchase of the pipeline. One-fourth of this amount was delivered, but the balance was not, and the trustees failed to approve the purchase. At a July 6, 1972 meeting between Benton, Janicki, and Weber, however, Janicki promised that the trustees would take some action on the pipeline in the month of July. As promised, the board of trustees authorized the staff to negotiate with Ingram for the purchase of the pipeline on July 20, 1972.

On August 23, 1972, Benton gave McPartlin $80,000 in cash. McPartlin told Benton that the trustees would approve the purchase of the pipeline in September, but Ingram would have to pay the balance of its contribution, about $95,000, in September also.

Between August and November, 1972, Ingram Corporation and the Chicago officials negotiated a new agree-

[6] Benton testified that he informed Frederick Ingram of Weber's first proposal that Ingram Corporation make a political contribution immediately after Weber made it in March, 1971, and that Ingram authorized the payments then.

ment. Ingram would pay $750,000 over a three year period, and the Sanitary District would purchase the pipeline, modify the liquidated damages clause, and extend the sludge-hauling contract for three years at a higher price per ton.

On December 28, 1972, representatives of the Ingram companies and the District signed an agreement covering the pipeline purchase that was to be effective only if the parties also signed two other agreements: a retroactive modification of the liquidated damages clause and a three year extension of the sludge-hauling contract. On January 26, 1973, the additional agreements were signed.

After the signing, Benton returned to his hotel room and telephoned Janicki to tell him that his money was ready. Janicki sent his secretary to pick up a package containing $50,000 in cash. Benton then telephoned Weber to tell him to come and pick up the balance of the money due. When Weber arrived, Benton gave him $95,000 in cash and nine letters of credit drawn on a Swiss bank in the amount of $70,000 each.[7]

One of the letters of credit matured in June, 1973, and each of the others matured sequentially at six-month intervals. Weber admitted negotiating the first four letters at the Swiss bank in July, 1973, December, 1973, June, 1974, and December, 1974. On each occasion, he purchased his plane ticket to Europe with cash, arranged for his trip to Switzerland only after he arrived in Europe, and stopped in Toronto, Canada, on the way back to the United States. On his last two trips, Weber telephoned Janicki from Europe.

[7] It is not clear whether the $95,000 due in September on the first agreement was ever paid. Nor is it clear why Benton paid Janicki and Weber $775,000 on January 26, 1973, rather than the $750,000 agreed to.

Sometime before the fall of 1974 a federal grand jury commenced an investigation of the events surrounding the sludge-hauling contract. In May, 1975, the government granted immunity to Benton.

In November, 1975, Weber sent his brother, Henry Weber, to Europe to negotiate the fifth and sixth letters of credit, which matured in June, 1975, and December, 1975.[8] Following his brother's instructions, Henry Weber did not proceed directly to the drawee Swiss bank but went to a bank in Vaduz, Liechtenstein, to have that bank present the letters to the Swiss bank.

On November 26, 1975, two weeks after his return from Liechtenstein, Henry Weber appeared before the grand jury and testified that he had only visited Frankfurt and Munich. On December 3, 1975, the government called Henry Weber to appear a second time before the grand jury, this time asking Weber to bring his travel records. During his second appearance, Henry Weber testified that he had been mistaken when he said that he had only visited Frankfurt and Munich and that he had also visited Vaduz.

On December 9, 1975, Franklin Weber's attorney telephoned one of the government's attorneys in this case and informed him of what the government attorney already had reason to suspect, namely, that Franklin Weber had possession of the remaining letters of credit.

Additional details and procedural matters necessary to an understanding of the various issues to be decided will be stated at appropriate places in the opinion.

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[8] It is not clear how Weber expected his brother to cash the sixth letter of credit in November, 1975; it did not mature until December, 1975. Nevertheless, it is undisputed that Henry Weber did go to Vaduz, Liechtenstein carrying the two letters of credit with the intent to negotiate them.

I.

Severance

Before discussing the specific attacks on the district court's denial of severance, some general principles should be noted. The question of whether charges that have been properly joined ought to be severed for trial is for the discretion of the trial judge, whose decision will be reversed only upon a showing of clear abuse. *United States v. Tanner,* 471 F.2d 128, 137 (7th Cir.), *cert. denied,* 409 U.S. 949 (1972). The defendant has the burden of showing prejudice, which is a difficult one. *Id. A denial of severance will rarely be reversed on review, Tillman v. United States,* 406 F.2d 930, 935 (5th Cir.), *cert. denied,* 395 U.S. 830 (1969), and then only for the most "cogent reasons," *United States v. Kahn,* 381 F.2d 824, 838 (7th Cir.), *cert. denied,* 389 U.S. 1015 (1967). There is, moreover, a strong policy in favor of joint trial "where the charge against all the defendants may be proved by the same evidence and results from the same series of acts." *United States v. Cohen,* 124 F.2d 164, 165 (2d Cir.), *cert. denied sub nom. Bernstein v. United States,* 352 F.2d 892, 896 (7th Cir. 1965) recently quoted in *United States v. Harris,* 542 F.2d 1283, 1312 (7th Cir.), *cert. denied,* 430 U.S. 934 (1976).

In the case at bar all appellants assert error in the denial of their motions for severance. Frederick Ingram argues that the denial deprived him of evidence that would otherwise have been available. The other appellants, whom we shall call the Illinois defendants, argue that they were prejudiced by the denial because Ingram and his brother (whom the jury acquitted) defended on a ground antagonistic to the defenses of their co-defendants and because of curtailment of cross-examination and the spillover effect of evidence admitted only against Frederick Ingram. We turn first to the argument of the Illinois defendants.

A. *The Illinois Defendants*

1. *Antagonistic Defenses*

The Ingrams contended that the payments were made only because the Sanitary District threatened to take action that would have resulted in financial disaster to Ingram Corporation, and therefore neither of them had the "intent (to influence the performance of an official act) required by the Illinois bribery statute." *United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). It was not necessary to this defense that the Illinois defendants were guilty of extortion or received bribes, because it was possible that Benton, through whom the corporation's communications with, and payments to, the Illinois defendants were carried out, did not pass any of the money on but kept it all himself.[9] Thus the Ingram defense was not necessarily antagonistic to the defenses of others, although it was possible, on the Ingrams' theory, that they were innocent even if the others were guilty.

Even if the defenses were to a degree antagonistic, however, it does not follow that there should have been two or more trials. One has no right to any tactical advantage that would result if evidence that is admissible against him in either a joint or separate trial might be unavailable in a separate trial. *Cf. Brady v. Maryland*, 373 U.S. 89, 90–91 (1963).[10] It is therefore the settled rule that a defendant

[9] Benton admitted siphoning off for his own use some of the funds that the Ingrams intended be paid to the Illinois defendants. See Part IV, *infra*.

[10] In *Brady*, which is famous for a holding irrelevant here (*viz.*, that the prosecution's suppression of evidence requested by the defense and material to punishment violated the due process clause of the Fourteenth Amendment), the Court also held that no federal right was violated by limiting a new trial to the issue of punishment where the suppressed evidence was inadmissible as to guilt, even though there might have been some spillover

is not entitled to a severance merely because it would give him a better chance of acquittal. *See United States v. Tanner, supra*, 471 F.2d at 137. Thus antagonistic defenses do not require the granting of severance, *United States v. Hutul*, 416 F.2d 607, 620 (7th Cir.), *cert. denied*, 396 U.S. 1007 (1970), even when one defendant takes the stand and blames his co-defendant for the crime, *United States v. Joyce*, 499 F.2d 9, 21 (7th Cir.), *cert. denied*, 419 U.S. 1031 (1974). Even when the defendant who testified he was the victim of extortion had dealt directly with the defendant alleged to have extorted the bribe, we sustained the denial of severance. *United States v. George*, 477 F.2d 507 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973).

There may be cases, as we recognized in *George*, in which the conflict among defendants is of such a nature that the "jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." 977 F.2d at 515. This is not such a case. The joinder did not result in the exclusion or admission of any evidence of consequence that would not have been excludable or admissible in separate trials. Nor was any argument made that could not properly

favorable to the defendant on the issue of guilt. At the first trial, in which a jury had convicted Brady of first degree murder and fixed penalty as death, the prosecution had failed to disclose a confession in which petitioner's accomplice admitted having actually strangled the victim. Concerning the petitioner's right to a new trial on both guilt and punishment, the Court said:

> A sporting theory of justice might assume that if the suppressed confession had been used at the first trial, the judge's ruling that it was not admissible on the issue of innocence or guilt might have been flouted by the jury. . . . But we cannot raise that trial strategy to the dignity of a constitutional right and say that the deprival of this defendant of that sporting chance through the use of a bifurcated trial . . . denies him due process or violates the Equal Protection Clause of the Fourteenth Amendment.

373 U.S. at 90–91 (footnote omitted).

have been made in such a separate trial. There was no cognizable prejudice arising from antagonistic defenses.[11]

2. *Curtailment of Cross-Examination*

Janicki complains that cross-examination was curtailed because of the joinder when, during cross-examination of Benton, the trial judge delivered a general admonition against repetitious cross-examination. Neither Janicki nor the other Illinois defendants, who adopt by reference his arguments on severance, show any prejudice resulting from the admonition or point to any specific ruling curtailing their cross-examination. It was, moreover, entirely proper for the judge to attempt to forestall repetition.

3. *Spillover Effect of Evidence Offered Against Frederick Ingram*

Janicki also asserts that he was prejudiced by evidence offered against Frederick Ingram showing that Ingram Corporation had bribed a Brazilian corporate official between 1969 and 1971, because the conduct of the Brazilian was similar to that with which Janicki was charged. The trial court instructed the jury to consider the evidence of the earlier bribe only as to Frederick Ingram's state of

[11] Although the Commentary to § 2.3(b) of the ABA *Minimum Standards for Criminal Justice: Standards Relating to Joinder and Severance* (Approved Draft 1968), contains a sentence which, standing alone, indicates that "defenses . . . antagonistic to each other" constitute a sufficient basis for granting a severance, the Commentary elsewhere states that this is only one of several factors to be considered and makes it clear that the appropriateness of severance depends upon the degree and kind of antagonism. See also the federal cases cited in the ALR Annotation referred to in the Commentary, 70 A.L.R. at 1184-1185; and see Annot., 82 A.L.R.3d 245, 250-251, 257-259 (1978). As the cases cited in the text of this opinion illustrate, the federal courts have held that an attempt by one defendant to place the guilt upon another does not require severance. See also 82 A.L.R. 3d at 260-261.

mind, but Janicki asserts that this instruction was ineffective. We see no substantial risk that the jury would believe that because a Brazilian corporate officer took a bribe from Ingram Corporation, Janicki did also, and therefore we conclude that Janicki was not prejudiced by the admission of this evidence. Its admissibility as to Frederick Ingram and the effectiveness of the limiting instruction are discussed below.

The Illinois defendants were not deprived of a fair trial by the joinder.

B. *Frederick Ingram*

Frederick Ingram's attack on the joinder is based on the district court's exclusion of three items of evidence offered to support his extortion defense, which Ingram argues occurred because he was tried with the men he allegedly bribed.

1. *The McPartlin Statements and the Attorney-Client Privilege Among Co-defendants and Their Counsel*

Throughout the period covered by the indictment, Benton kept diaries, or appointment calendars, in which he made notes concerning meetings and telephone conversations, naming the persons involved and often recording the substance of the conversations. The Benton diaries figured prominently in the governments's case, for they corroborated much of his testimony.

Destroying Benton's credibility was important to Ingram, as it was to the other defendants, even though Ingram's defense was based, in part, on the argument that he had made the payments in response to the threats Benton had reported to him, because Ingram's account of events in issue differed materially from Benton's, and because the government's case hinged largely on Benton's testimony. Since Benton's diaries corroborated so much of

his testimony, it was imperative from the stand-point of all defendants that an effort be made to discredit them.

Such an effort was made, and Frederick Ingram and McPartlin cooperated in that effort. In a brief supporting a pretrial "Motion for Additional Time to Conduct Document Analysis," Ingram's counsel stated, with reference to contemplated tests on the Benton diaries,

> [T]he defendant Frederic B. Ingram is not the only defendant who may be affected by the results of these tests. Besides the general effect of the doubts that may be raised as to Benton's veracity and the credibility of the diary entries, the case against at least one other defendant—Robert F. McPartlin—may be substantially affected by the results of the tests. From the results of the tests conducted so far, it appears that at least two of the suspicious diary entries relate to alleged payments of money to Mr. McPartlin.

An investigator acting for Frederick Ingram's counsel twice interviewed McPartlin with the consent of the latter's counsel[12] for the purpose of determining whether there was a basis for challenging the truth of some of the diary entries. In the second of these interviewes McPartlin made certain statements, which Ingram argues tend to support his defense. At trial when Ingram offered evidence of these statements, McPartlin's counsel objected on the ground, *inter alia*, of the attorney-client privilege, and the court, after an *in camera* hearing, sustained the objection on this and another ground.[13]

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[12] McPartlin's attorney advised McPartlin to meet with the investigator because it was in the interest of all the defendants to "poke holes" in the Benton diaries.

[13] In the alternative, the court ruled that McPartlin's statements were inadmissible hearsay not within the exception provided by Rule 804(b)(3), Fed. R. Evid. (declarations against penal interest). Since we agree that McPartlin's statements are protected by his attorney-client privilege, and in any event their exclusion was not prejudicial, we do not reach the alternative ground for exclusion.

The exclusion of the McPartlin statements would not be reversible error even if he had not been entitled to claim the privilege. We are satisfied from our examination of the transcript of the *in camera* hearing, which was sealed and made a part of the record on appeal, that the statements merely corroborated facts which were admitted in evidence and which the jury obviously found to be true.[14] We do not disclose the contents of the statements because they remain protected by the attorney-client privilege, on which we alternatively base our ruling on this point.

McPartlin was entitled to the protection of the attorney-client privilege, because his statements were made in confidence to an attorney for a co-defendant for a common purpose related to both defenses. They were made in connection with the project of attempting to discredit Benton, a project in which Ingram and McPartlin and their attorneys were jointly engaged for the benefit of both defendants. Ingram acknowledges that communications by a client to his own lawyer remain privileged when the lawyer subsequently shares them with co-defendants for purposes of a common defense. The common-defense rule, which is not as narrow as Ingram contends, has been recognized in cases spanning more than a century. *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1971); *Schmitt v.* Emery, 211 Minn. 547, 2 N.W.2d 413 (1942); *Continental Oil Co. v. United States*, 330 F.2d 347 (1964); *Hunydee v. United States*, 355 F.2d 183 (9th Cir. 1965); *Matter of Grand Jury Subpoena*, 406 F.Supp. 381, 387-389 (S.D.N.Y. 1975); *see*

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[14] The trial judge remarked at one point that the evidence "would be of great assistance to Ingram" if admissible. With respect, we see no basis for that conclusion and believe that, if the judge had been given the opportunity we have had to lay the facts proved in other ways beside the proffered evidence and carefully compare the two, he would have reached the same conclusion we do.

State v. Emmanuel, 42 Wash.2d 799, 259 P.2d 845, 854-855 (1973); Note, "Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information," 63 Yale L.J. 1030 (1954); Note, "The Attorney-Client Privilege in Multiple Party Situations," 8 Colum. J.L. Soc. Prob. 179 (1972). Uninhibited communication among joint parties and their counsel about matters of common concern is often important to the protection of their interests. Note, *supra*, 8 Colum J.L. Soc. Prob. 179-180. In criminal cases it can be necessary to a fair opportunity to defend. Therefore, waiver is not to be inferred from the disclosure in confidence to a coparty's attorney for a common purpose.

In the case at bar, the judge found, as a preliminary question of fact, from the evidence adduced at the hearing held pursuant to Rule 404(a), Fed. R. Evid., that McPartlin had made the statements to the investigator in confidence. That finding is not clearly erroneous.

Ingram argues that the co-defendants' defenses must be in all respects compatible if the joint-defense privilege is to be applicable. The cases do not establish such a limitation,[15] and there is no reason to impose it. Rule 503(b)(3) of the proposed Federal Rules of Evidence, as approved by the Supreme Court, stated that the privilege applies to communications by a client "to a lawyer representing another in a matter of common interest." See 2 J. Weinstein, *Evidence* 503-52 (1977). The Advisory Committee's Note

[15] In *Hunydee v. United States*, *supra*, the attorney for Hunydee's co-defendant believed that the government would not prosecute the co-defendant if Hunydee pleaded guilty, and therefore their interests conflicted. Nevertheless, the Ninth Circuit held that statements made by Hunydee during a joint conference held for the purpose of discussing his willingness to plead guilty, a matter of common interest, which affected both attorneys' subsequent representation of their respective clients, were privileged. Similarly, in *Schmitt*, *supra*, the common interest of the co-defendants related to the exclusion of a specific item of evidence. See, Note, *supra*, 63 Yale L. J. 1030, 1035-1036.

to proposed Rule 503(b) makes it clear that the joint-interest privilege is not limited to situations in which the positions of the parties are compatible in all respects:

> The third type of communication occurs in the "joint defense" or "pooled information" situation, where different lawyers represent clients who have *some* interests in common. . . . The rule does not apply to situations where there is *no* common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis.

Quoted in 2 J. Weinstein, *supra*, at 503-6 to 503-7. (Emphasis supplied and citations omitted.) Although the Congress, in its revision of the Federal Rules of Evidence, deleted the detailed privilege rules and left the subject of privilege in federal question cases to "be governed by the principles of common law as they may be interpreted by the courts of the United States," R. 501, Fed. R. Evid., the recommendations of the Advisory Committee, approved by the Supreme Court, are a useful guide to the federal courts in their development of a common law of evidence. 2J. Weinstein, *supra*, 501-20.4 to 501-20.5. In this instance we follow the recommendation. The privilege protects pooling of information for any defense purpose common to the participating defendants. Cooperation between defendants in such circumstances is often not only in their own best interests but serves to expedite the trial or, as in the case at bar, the trial preparation.[16]

Ingram also seems to argue that the communication was not privileged because it was made to an investigator rather than an attorney. The investigator was an agent for

[16] *Smale v. United States*, 3 F.2d 101, 102 (7th Cir. 1924), relied on by Ingram, in which one defendant volunteered statements to another defendant and the latter's attorney and the requisite joint interest and confidentiality were both lacking, does not establish the compatible defense requirement for which Ingram argues.

Ingram's attorney, however, so it is as if communication was to the attorney himself. "It has never been questioned that the privilege protects communications to the attorney's. . .agents. . .for rendering his services." 8 Wigmore, *Evidence* § 2301 at 583 (McNaughton rev. 1961); *cf. United States v. Kovel*, 296 F.2d 918, 921-922 (2d Cir. 1961) (client's communications to an accountant employed by his attorney).

Nor was it, as Ingram contends, fatal to the privilege that McPartlin made the statement, in effect, to Ingram's attorney rather than his own. When the Ingram and McPartlin camps decided to join in an attempt to discredit Benton, the attorney for each represented both for purposes of that joint effort. The relationship was no different than it would have been if during the trial the Ingram and McPartlin attorneys had decided that Ingram's attorney would cross-examine Benton on behalf of both, and during cross-examination McPartlin passed Ingram's attorney a note containing information for use in the cross-examination. The attorney who thus undertakes to serve his client's co-defendant for a limited purpose becomes the co-defendant's attorney for that purpose. A claim of privilege was upheld in circumstances such as these where communications were made directly to the attorney for another party in *In the Matter of Grand Jury Subpoena Duces Tecum, supra*, 406 F.Supp. at 391. *United States v. Friedman*, 445 F.2d 1076, 1085 n.4 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971), relied on by Ingram, is not to the contrary. In *Friedman* the court held its decision in *Hunydee v. United States, supra*, inapplicable, because no joint defence or common interest was alleged. The court went on to state, in the footnote relied upon, that even if *Hunydee* was applicable, there was no privilege since "the facts of the conversation negate confidentiality." 445 F.2d at 1085 n.4.

Inasmuch as McPartlin was entitled to assert the privilege whether Ingram was tried jointly or separately, no prejudice would have resulted from the joint trial by reason of the exclusion of the McPartlin statements even if those statements had not been merely cumulative.

2. *Relevance of Threats Against Benton*

Frederick Ingram also argues that joinder caused specific prejudice through the trial court's exclusion, as prejudicial to other defendants, of evidence of threats of physical harm directed against Benton. The short answer is that prejudice to other defendants was not the only ground for the exclusion. The excluded evidence consisted of testimony by Ingram that in the fall of 1972 Benton expressed fear for his own physical well-being if Ingram refused to make the promised payments to the Chicago officials, and testimony by two other witnesses that Benton told them in October 1974 that someone had threatened him with physical harm. To begin with both statements by Benton were said to have been made long after February 1972, when Ingram, by his own admission, authorized Benton to make payments to secure the contract. There is no indication in the record that the second, made long after all payments were made, was ever communicated to Ingram. The alleged threats were directed at Benton, not Frederick Ingram, who had no dealings in the matter with anyone outside Ingram Corporation. Finally, Ingram's theory throughout the trial was economic, not physical, coercion.[17] The evidence was properly excluded as irrelevant, and it would have been equally irrelevant if Ingram had been tried separately.

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[17] In *United States v. McClure*, 546 F.2d 670 (5th Cir. 1977), relied upon by Ingram, the court held it to have been reversible error to exclude as irrelevant "evidence of a systematic campaign of threats and intimidation" by an informer against persons other than the defendant, offered to corroborate the defendant's testimony that he had been threatened and coerced by the informer to commit the crime charged. The case is not authority for the

3. *Relevance of an Unrelated Payment by a Third-Party*

Frederick Ingram also contends that the joinder caused the exclusion of evidence that an attorney who represented Ingram Corporation before the Illinois Commerce Commission made a $5,000 contribution to McPartlin's reelection campaign fund, and that the payment was motivated in part by McPartlin's having recommended the attorney's firm to Ingram Corporation. There was no showing that the attorney was coerced. This evidence, offered first by the prosecution and then by the Ingrams, was rightly excluded on both occasions as irrelevant. In rejecting the Ingram offer the court said that it "could be prejudicial to McPartlin without being probative of an issue as far as the Ingrams are concerned." Prejudice to McPartlin aside, the trial court was correct as to the probative value of the evidence.

We therefore conclude that the denial of the motions for severance was not error.

SPRECHER, *Circuit Judge:*

I concur in the portions of this opinion prepared by Judges Pell and Tone.

II.

Extortion Defense Instruction

As noted earlier, defendant Ingram never denied making certain of the illicit personal payments to officials of the

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proposition that evidence of threats of physical violence, made by some unnamed person, directed at a person other than the defendant, is relevant in a case in which the defendant does not contend that his criminal activity was motivated by threats of physical violence or that he even had knowledge of such threats at the time of his criminal activity.

Sanitary District. Instead Ingram premised his defense to the counts relating to these payments on the theory that these payments were not intended as bribes but were extorted from him by threats that, unless these payments were made, the Sanitary District would, contrary to an alleged understanding, refuse to purchase the pipeline which Ingram had already constructed and would invoke the liquidated damages clause to further penalize Ingram Corporation.[18] In relation to these arguments, the trial court gave the jury the following instructions on the defense of extortion:

> Now, I have just told you that willful conduct, which is required in each of the crimes charged in this indictment, must be voluntary.
>
> One of the defenses raised by the Defendants Frederic B. Ingram and E. Bronson Ingram is that they authorized certain payments to be made only because they were told unless the payments were made, the pipeline would not be paid for and the liquidated damage provision would be used against Ingram Barge Company in an unreasonable and punitive manner. These defendants claim, therefore, that they did not commit bribery or conspire to commit bribery and lacked the intent to bribe.
>
> In analyzing this defense, there are several things for you to consider. First, you should determine whether a defendant did in fact authorize payments because of a fear of economic loss. If you find that a defendant did authorize any of the payments in ques-

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[18] It is to be noted that this defense is inapplicable to the counts under which Ingram was found guilty of participation in payments made prior to February, 1972. (Counts 3, 4, and 5.) As to these counts Ingram contended he did not know of the payments. The conspiracy count (Count 1) involved payments made before and after that date, but the verdicts on the three substantive counts tell us that the jury disbelieved Ingram's denial of knowledge of the earlier payments, so the extortion defense would not suffice under the conspiracy count.

tion, but that he did so solely to procure an economic advantage rather than out of fear of an economic loss, then this defense that the act was involuntary must fail.

On the other hand, if you do find that a defendant authorized payments because of his fear of economic loss, then you should proceed to a consideration of whether that fear of economic loss was such as to render his action involuntary within the meaning of the law.

There are several things to consider in this connection. First, did the defendant fear loss as a result of a withholding of something to which he believed Ingram Barge Company was already legally entitled? Specifically, did the defendant believe that the Metropolitan Sanitary District was already under a legal obligation to pay Ingram Barge for the pipeline? Did he believe that the threatened assessment of liquidated damages was legally unjustified?

The answers to these questions are important because there is a difference between paying a public official for something one is entitled to receive and paying a public official for something one is not entitled to receive.

If one does not believe he is legally entitled to receive the thing in question, then, no matter how much he needs it and no matter how great the economic loss one might suffer by not receiving it, there can be no legal justification for paying a public official to get it. Such a payment is bribery, pure and simple.

However, if one is legally entitled to the thing in question or in good faith believes he is legally entitled to it, then the fear of economic harm from not receiving it may be sufficient to render the act of payment involuntary, depending upon three additional considerations: The seriousness of the economic harm perceived by the defendant, the effect that perception had on his ability to exercise free choice, and the

defendant's awareness of reasonable alternatives to the making of the demanded payments.

If a defendant did not in fact fear serious economic harm or if his fear did not substantially impair his ability to exercise free choice or if he was aware of actions he might take to forestall the harm without making the payments and chose not to take those actions, then his conduct in authorizing the payment cannot be considered involuntary within the meaning of the law.

In order to prove, therefore, that a defendant acted willfully as opposed to involuntarily in authorizing a payment, the government must prove one of the following things: (a) that the defendant was not motivated by a fear of economic harm in authorizing the particular payment, or (b) the thing which the defendant sought to obtain by making the payment was not something he believed Ingram Barge Company was legally entitled to have without making the payment, or (c) the defendant did not perceive the threatened economic harm to be of serious magnitude, or (d) the defendant's fear was not such as to substantially impair his ability to exercise free choice, or (e) and finally, the defendant was aware of reasonable alternatives to making the payments and chose not to pursue those alternatives.

Defendant Ingram urges that this instruction was prejudicial error in three respects. In considering these contentions we shall assume without deciding, that as the instruction states, under Illinois law, if one who pays a bribe is or believes himself to be "legally entitled" to have the official take the action induced by the bribe, "then the fear of economic harm from not receiving it may be sufficient to render the act of payment involuntary." This court's decision in *United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), in the following words, left open the question whether this is so but did establish the rule applicable in the case of a discretionary

official decision:

> [A]t least in a case where a discretionary or legislative decision . . . has been requested, the withholding of such action until a money demand is met could not negate the intent (to influence the performance of an official act) required by the Illinois bribery statute.

Id. at 84.

First, Ingram argues that the distinction between economic loss and gain was erroneous. The prejudice from this distinction allegedly arose from the fact that the jury was likely to define economic loss as the payment of money and economic gain as the receipt of money and therefore might have rejected the extortion defense out of hand on the ground that the admitted object of the payment was to complete the sludge-hauling project and thereby gain a profit. In response we note initially that Ingram here has too narrowly characterized his own defense. Ingram asserted throughout the trial and continues to assert before us that the payments were at least in part motivated by a desire to avoid assessment of liquidated damages. Even under the simplistic construction of the loss-gain distinction which Ingram alleges was most likely, this would constitute an economic "loss" thereby preventing the jury from rejecting the defense on the basis of the loss-gain distinction.[19] Moreover it is not clear that Ingram preserved this objection for appeal: the written objection to the instruction tendered at trial makes no mention of any

[19] Indeed Ingram seems to have admitted as much. In his brief defendant Ingram states: "Alternatively, the jury might confusingly [*sic*] have reasoned that threatened liability under the liquidated damages clause was an 'economic loss'. . . ." Brief for Defendant Ingram at 37.

error in this distinction.[20] Finally, we are not convinced that the jury would put such a simplistic construction on the loss-gain distinction. Certainly it requires no extraordinary economic acumen to realize that the receipt of money may not represent an economic gain if the amount received is less than an amount to which one was previously entitled. Conversely, an ordinary juror would certainly realize that a real economic gain accrues only when a person becomes entitled to something to which he had no prior entitlement, that is, when a discretionary official act is performed for his benefit. The district court followed this gain-loss instruction with a discussion of the concept of entitlement, explicitly denoting a "loss" as a failure to receive a benefit to which one was entitled, thereby further clarifying the interdependent relation between these two concepts.[21]

[20] Ingram made the following written objection to the instruction:

> Court's Instruction No. 2: The Ingram defendants have tendered several alternative charges dealing with the subject matter as Court's instruction No. 2, each of which we submit correctly states the law with respect to the effect of economic coercion on the defendant's alleged intent to bribe. In support of the tendered charges, we referred to our memorandum on the "extortion defense" submitted to the Court in July 1977, which we incorporate by reference here. The instruction given by the Court treats the issue not as one of economic coercion bearing on intent, but as one of duress, contrary to the analysis in *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966), and contrary to the pattern instruction in Devitt & Blackmar § 34.10. Accordingly, we object to the Court's charge in this respect and we object to the omission of any of the proposed instructions on this issue tendered by the Ingram defendants, or some modified version of those proposed instructions.

[21] Ingram attempts to bolster this argument by urging that decisions under the Hobbs Act have rejected any distinction be-

Ingram advances a second attack on this instruction. He argues that the district court erred in instructing the jury that the extortion defense is unavailable if the defendant did not believe that he had a legal entitlement to the official action. Once again we must note that this objection appears not to have been properly preserved for appeal, since Ingram's objection to the trial court did not criticize the entitlement aspects of the instruction[22]. Even if this objection were properly preserved, it lacks merit. The district court's instruction is consistent with *Peskin*.[23]

Ingram's final objection to the trial court instruction is that the instruction, by its emphasis on the voluntariness of the payments, implicitly disallowed the extortion defense and permitted only the narrower defense of duress. Assuming that the distinction drawn in *United States v. Barash*, 365 F.2d 395 (2d Cir. 1966), between the defenses

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tween threats of economic loss and gain in extortion prosecutions. *See, e.g., United States v. Hathaway*, 534 F.2d 386 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976). We do not see the relevance of such authority, however, since there is no reason that conduct giving rise to criminal liability for extortion should necessarily provide a criminal defense for the reciprocal party. Indeed it does not seem illogical to suggest that it may be reasonable to prosecute both the official who conditions discretionary benefits on bribes and the person who seeks to obtain such benefits. *See United States v. Hall*, 536 F.2d 313, 321 (10th Cir. 1976), *cert. denied*, 429 U.S. 984 (1977) ("bribery and extortion are not to be considered mutually exclusive nor does the fact that the alleged victims of the extortion were also bribers nullify anything."); *United States v. Gill*, 490 F.2d 233 (7th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974).

[22] *See* note 20 *supra*.

[23] *United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1975), *cert. denied*, 429 U.S. 918 (1976). *See* p. 25 *supra*.

of duress and extortion is correct,[24] the instruction could not have prejudiced Ingram since Ingram, before this court and the trial court, characterized his own conduct in such a way as to absolutely preclude the availability of the extortion defense, even assuming that the voluntariness of his conduct alone would not negate the extortion defense. Ingram, during the course of the trial, admitted that he had no legal entitlement to the benefits which his payments were designed to obtain.[25] Accordingly he is absolutely precluded from prevailing on an extortion defense

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[24] As the court in *Barash* noted:

> Although the instruction that only a threat of death or serious bodily injury would make out the defense of duress appears correct enough . . . that was only part of the story since Barash had also requested instructions as to the bearing of threats of economic harm on the intent required for conviction. . . . We think that if a government officer threatens serious economic loss unless paid for giving a citizen his due, the latter is entitled to have the jury consider this, not as a complete defense like duress but as bearing on the specific intent required for the commission of bribery.

365 F.2d at 401-02

[25] The defendant clearly makes these admissions in his brief when he argues that the entitlement distinction was erroneous:

> This second element [of the instructions, that the extortion defense was not availabble if the defendant was seeking a benefit to which he was not entitled,] was tantamount to a judicial instruction to reject the extortion defense in light of the record that had already been made. Bronson Ingram had testified (as quoted at pp. 16-17, *supra*) that on February 21, 1972, during the meeting between the Ingram brothers and Benton, Benton had said, "[W]e don't really have a legal position to get the rest of our money" (Tr. 4075). Indeed, it

under *Peskin*, which makes that defense unavailable where the defendant is seeking to obtain a benefit not owed and thus the emphasis of the instructions on involuntariness could not have harmed the defendant.[36]

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was precisely because there was no legal recourse that, according to both Ingrams, they saw no option other than to capitulate to the demands.

. . . .

On any fair reading of the record, Mr. Ingram was in the position of ordinary applicants for zoning variances or for discretionary governmental action. He honestly—and with substantial basis—believed that it was right and proper for the MSD to exercise its discretion to purchase the pipeline and to refrain from punitive use of the liquidated damages clause. Whether he also believed that Ingram Corporation had a legal right under the existing contracts to obtain this result was completely irrelevant to the question of his intent to commit bribery.

Brief for Defendant Ingram at 39-41 (emphasis supplied). Ingram's admission that he was in the same position as "ordinary applicants for zoning variances" is particularly damaging in that it was in precisely that context in *Peskin* that we explicitly held the extortion defense to be unavailable as a matter of law. 527 F.2d at 84. *See also* the cited quotation on p. 25 *supra*.

[36] Ingram also objects to the trial court's refusal to give a "theory of defense" instruction describing Ingram's view of the extortion. This is a somewhat surprising argument since the trial court's instruction gave more factual information as to the defendant's theory, albeit more concisely, than the defendant's proposed instructions. Ingram's factual theory of his defense is detailed in the following excerpts from the defendant's proposed instructions:

> If, on the other hand, the Ingram defendants had formed no purpose of offering any money or thing of value to any personnel of the Metropolitan Sanitary District, and acted only because of demands or threats communicated by Benton, and believed that the Metropolitan Sanitary District

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intended to carry out the threats not to pay for the pipeline and destroy the company on the barging operations unless their demands were satisfied, or if you have a reasonable doubt on this issue, then the essential element of intent is not present and you will find the defendants Frederic B. Ingram and E. Bronson Ingram not guilty of all charges.

. . . .

It is the position of the defendants Frederic B. Ingram and E. Bronson Ingram that they had no purpose of improperly offering or promising any money or thing of value to any official of the Metropolitan Sanitary District in connection with the sludge contract, and that they did not devise or intend to devise a scheme or artifice to defraud either the Metropolitan Sanitary District, its citizens, its officers and employees, or the Burlington Northern Railroad and other competitors. Indeed, it is the position of the defendants Frederic B. Ingram and E. Bronson Ingram that they acted only because of demands or threats communicated to them by William J. Benton and because they believed that those threats would be carried out unless the demands were satisfied.

If you find that the defendants Frederic B. Ingram and E. Bronson Ingram did not act voluntarily, or had formed no purpose of offering any money or thing of value to the employees or officers of the Metropolitan Sanitary District, and acted only because of demands or threats communicated by William J. Benton, and that they believed that those threats would be carried out unless the demands for payment were satisfied, then the essential element of intent is not present and you must find the defendants Frederic B. Ingram and E. Bronson Ingram not guilty of the charges against them.

In contrast to these generalized and repetitive instructions, the trial court instructions, set out on pages 23–25 *supra*, concisely explained the defendant's theory that the alleged extortion scheme revolved around threats not to purchase the pipeline, as well as setting out defendant's additional factual theory that the scheme involved threats to assess liquidated damages in an unreasonable manner. Thus, the defendant Ingram's claim that the trial court erred in rejecting a "theory of defense" instruction is without merit.

III.

Evidence of Ingram's Bribes of Foreign Officials

At trial the government, seeking to rebut Ingram's testimony that he made the payments only as a victim of extortion, sought to demonstrate that in other instances Ingram had been willing to make such payments without the alleged incentive of extortion. The trial court carefully screened this proffer with an ex parte review of the evidence, an in camera meeting with all counsel, and a voir dire of the government witnesses. After this careful consideration, the court, although rejecting a substantial portion of the government's offer of proof,[27] permitted the government to introduce testimony that Ingram had made surreptitious payments to an employee of a semi-official Brazilian corporation in order to receive preferential treatment.

The government introduced at trial the testimony of Chris Daley, an official of the Ingram Corporaton, to establish the government's account of Ingram's alleged prior bribe. Daley testified that in 1967 the Ingram Corporation became interested in engaging in an off-shore drilling project conducted by Petrobas, a Brazilian oil company owned

[27] The government offered to prove that Ingram had personal control of a cash box containing unreported funds from scrap sales which were distributed to Louisiana politicians. Additionally the government offered to prove that a joint-venture in which Ingram Corp. was a participant had paid a real-estate commission to a Louisiana state representative who gave part of that payment to another state representative and kicked back another part of it to Frederic Ingram personally. The government also offered to prove that Ingram Corp. made kickback payments to an Amoco employee who was potentially able to provide inside information and influence the level of payments by Amoco to Ingram. Finally, the government said it could prove that Ingram Corp. had made an interest-free, uncollateralized loan to an Indonesian military officer who was able to influence contracts for Ingram in Indonesia.

jointly by the Brazilian government and private investors. Daley and Benton then met with Levindo Caniero, the Petrobas official with responsibility for procuring the contractor for the off-shore drilling. As a result of this meeting, Caniero agreed to provide inside information to Ingram Corporation to assure that it was low-bidder in exchange for a "payoff or commission." Benton, Oaley and Caniero agreed that these payments should be made into a Swiss bank account. The contract was then awarded to Ingram Corporation through a letter of intent. However, Caniero threatened to withdraw the letter of intent because of a delay in Ingram Corporation's establishment of a Swiss account for him. At this point Daley informed Ingram that the letter of intent was about to be lost because of the delay in making the payoffs. Ingram then put Daley in touch with an international banker at Lehmann Brothers to expedite the establishment of the account. Subsequently, between 1969 and 1973, $172,000 was paid into the account.

We hold that this evidence was properly admissible against Ingram in that it tended to refute Ingram's defense that he lacked the intent to bribe the Chicago defendants and made the payments only to satisfy extortionate demands. Rule 404(b) of the Federal Rules of Evidence permits proof of prior crimes or acts where it is used for such purposes "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." This provision has been interpreted as permitting admission of evidence of prior acts as long as it has a substantial relevance to an issue other than showing that the defendant has a criminal character and therefore possesses a propensity to commit criminal acts. *See, e.g., United States v. Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978). Or, as this court has held, such evidence is admissible "if, entirely apart from the matter of 'propensity,' it has a tendency to make the existence of *an element* of the

crime charged more probable than it would be without such evidence." *United States v. Fairchild*, 526 F.2d 185, 189 (7th Cir. 1975), *cert. denied*, 425 U.S. 942 (1976) (emphasis added).

Ingram forwards three attacks on the admission of this evidence. First, he claims, the prior payments to Caniero were not sufficiently similar to the payments for which he was indicted to establish their relevance to his intent. Before examining the particular dissimilarities urged, we note that there is no requirement that the prior acts be virtually identical to the charged acts and that it is sufficient that the acts be similar enough and close enough in time to be relevant. The major thrust of Ingram's argument is that there is no showing that the Brazilian payments were either illegal or immoral since such payments are simply a way of doing business in Brazil. Initially we must note that we would be loathe to assume that surreptitious payments to government or private officials is a common and accepted practice in Brazil absent proof to that effect. Ingram admits that neither he nor the government offered proof on that matter, and thus this argument rests solely on Ingram's facile and unsupported characterizations of Brazilian practice. However, even were we to accept that such payments are a legal and accepted practice in Brazil,[28] we do not find that fact sufficient to differentiate the two transactions. In *United States v. Baggett*, 481 F.2d 114

[28] Ingram's assertion that such a practice is "moral" in Brazil tempts us to examine the philosophical underpinnings of an ethical system that varies with geographical or cultural boundaries. Even if morality varies with one's own culture, can it be said that an individual from a cultural and moral tradition that condemns a practice can morally engage in that practice once he simply steps "across the river" into a culture with different norms? *See* B. Pascal, Pensees 151 (Editions Garnier Freres 1964) ("*Plaisante justice qu'une riviere borne! Verite au deca des Pyrenees; erreur au dela.*"—"Curious justice that a river bounds! Truth on one side of the Pyrenees: error on the other.")

(4th Cir.), *cert. denied*, 414 U.S. 1116 (1973), the government was permitted to introduce in a Travel Act bribery prosecution against a zoning official evidence showing a series of transactions wherein gifts were made to the official and favorable actions by him on behalf of the donor followed shortly thereafter. The defendant urged that since no showing of a *quid pro quo* had been made by the government there was nothing to establish anything improper in these transactions. The court, however, admitted the evidence holding that regardless of the propriety of the individual's acts, the evidence demonstrated a course of conduct which indicated the defendant's "preference for favors and gifts over his public duty." *Id.* at 115. Likewise here, whatever the moral and legal status of the Brazilian payoffs, they indicate that the defendant had knowingly circumvented ordinary business channels with "facilitating payments." Admittedly the illegality of such payments to government officials in the United States would make such payments less likely than those not involving illegality; that, however, does not deny that one making such payments, legal or not, is more likely to have the intent to influence official action by similar payments in other instances than one who has never made such payments.[29] The other differences urged by Ingram are even less substantial. The fact that the Brazilian official was an employee of a semi-public entity and that the indictment alleged payments to employees of a wholly public governmental entity is a completely negligible difference, unless of course one makes the irrational assumption that one who would knowingly cheat both the public and private investors would not knowingly cheat the public alone. Nor is it relevant that the Brazilian payoff was not initiated by Ingram: we can see no difference in active participation in

[29] *See also United States v. Peskin*, 525 F.2d 71, 84 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1978) (upholding admission of evidence of subsequent bribes to public officials).

making payments suggested by another and initiation of the suggestion itself, since one who is willing to perform the essential act of bribery—that is, to dispense the bribe moneys themselves—must be presumed to have also been willing to suggest the bribe. Finally, we reject Ingram's characterization of the Brazilian transaction as involving less harm than the Sanitary District bribes since the latter added the amount of the bribes onto the contract price. Nothing in this record suggests that the amounts charged to Brazil would not have decreased once the cost of the project was reduced by the amount of the bribes. Further, it is axiomatic that for a competitively-bid project, where no inside information was available, Ingram would have bid less and therefore charged less than where the project is guaranteed by virtue of a bribe and Ingram could set its own price. It is therefore completely disingenuous to suggest that the level of harm differed.

Ingram's second objection is that there was no clear and convincing proof that Ingram knew the purpose of the payments made to Caniero. We have held that there must be clear and convincing evidence of the prior act to justify its admissibility,[30] and we find that there is evidence in the record to meet that standard. Daley testified in camera as to Ingram's reaction when he learned of the payments and that Benton's delay in setting up the account might lead to a revocation of the letter of intent. Daley stated:

> Benton was to open it, which we wouldn't do. So that's when I called Fritz, and Fritz says, "Jesus Christ. How did you get into that," or whatever. And he says, "Okay, okay. We will go ahead and call him back and see what we can put together."

[30] *United States v. Feinberg*, 535 F.2d 1004, 1009 (7th Cir.), *cert. denied*, 429 U.S. 929 (1976). Compare the majority opinion in *United States v. Beechum*, 582 F.2d 898, 910, 912-913 (5th Cir. 1978) (en banc) with the dissent in that case, *id.* 918, 922-923 (Goldberg, Godbold, Simpson, Morgan, and Roney, JJ., dissenting).

(Tr. 5638). At trial, Daley testified as to Ingram's response to knowledge of the payments in the following terms: "Mr. Ingram, in disgust, says 'Well, okay. I will see what I can do about it. . . .' " (Tr. 5674). It is difficult to understand why Ingram would have responded "in disgust" or with queries as to how Daley became involved "in that" unless he knew that the payments were illicit payments made to procure unauthorized benefits or at least were improper in some respect. Furthermore, the government introduced a memorandum sent out by Daley to Ingram in which Daley stated that he knew after speaking with Petrobas personnel that Ingram would be the low bidder and that Caniero had insured Daley that "we could count on him for any assistance we need." Considering all the evidence, particularly Ingram's reaction to Daley's statement and his knowledge that Ingram was assured to be the low bidder, there is a convincing portrait of Ingram's knowledge of the purpose of the Caniero payments.

Finally, Ingram urges, relying on Rule 403 of the Federal Rules of Evidence, that the prejudicial impact of the evidence outweighed its relevance and therefore should have been excluded. Ingram must sustain a heavy burden to succeed on this argument since the careful balancing of the probative value of prior acts versus their possible unduly prejudical effect is uniquely appropriate to the informed discretion of the trial judge. *See United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978). More precisely, this balancing entails considering whether the probative value this evidence had in indicating that Ingram's intent was to bribe, not to satisfy extortionate demands, outweighs its possible prejudicial effect, that is, the possibility that the jury will take the evidence to be indicative of a criminal disposition.

The highly judgmental character of this test mandates that we not restrike the balance ourselves but instead

examine only the manner in which the district court exercised its discretion. The record here shows that the trial court was meticulous and deliberate in its decision to admit the evidence. The trial court heard in camera evidence of a number of prior acts which th government had sought to introduce.[31] After extensive discussion the court permitted proof only of the Petrobas transaction. Further, the court required the government to present its witness to the Petrobas transaction in camera to confirm the substance of the testimony. Finally, to minimize any prejudice the court preceded the presentation of this witness's testimony before the jury with an extensive limiting instruction emphasizing that Ingram was not "on trial" for this previous transaction, that the evidence was to be considered only as it concerned Ingram's intent in the Sanitary District transaction and that the court passed no judgment on the value of this evidence. Courts have often looked to these factors indicating due consideration to uphold the trial court's judgment. *See, e.g., United States v. Carleo,* No. 77-1103 (10th Cir. May 12, 1978). In particular, the use of limiting instructions has been accorded great significance. *See United States v. Sigal,* 572 F.2d 1320, 1323 (9th Cir. 1978). We therefore decline to hold that the trial court abused its discretion.

IV.

Government's Compliance with Brady v. Maryland

During his opening statement, counsel for the government revealed that the principal government witness, Benton, had embezzled and applied to his own benefit $375,000 of the money he obtained from Ingram in order to pay off the Chicago defendants. Although the government had turned over to the defendants both Benton's and Ingram Corporation's financial records, from which the govern-

[31] *See* note 27 *supra.*

ment asserts the defalcations could have been discerned by the defendants, the government did not turn over to the defendants Benton's grand jury testimony in which he referred to the $375,000 as "the amount of money I am responsible for keeping," nor did the government disclose that Benton had expressly admitted the embezzlements in interviews with government counsel. Defendants McPartlin and Janicki, relying on *Brady v. Maryland,* 373 U.S. 83 (1963), urge that this failure to disclose this information earlier violated their Due Process rights and mandates reversal of the convictions.

We note initially that *Brady* and its successor, *United States v. Agurs,* 427 U.S. 97 (1976), address a thoroughly different problem than the one before us. The concern of *Agurs* and *Brady* is whether the suppression of exculpatory material until after trial requires that a new trial be given so that this evidence may be considered. The Court in *Agurs* characterized the situations to which the *Brady* principles apply as those involving "the discovery, *after trial,* of information which had been known to the prosecution but unknown to the defense." 427 U.S. at 103 (emphasis supplied). Indeed the standard developed in *Agurs* can only sensibly be applied to the suppression of evidence throughout the trial: "if the *omitted* evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *Id.* at 112 (emphasis supplied).

The defendants here, however, do not complain of a total suppression of favorable evidence but merely attack the timing of the disclosure of such evidence. Here the prosecutor did not conceal or withhold evidence of Benton's defalcations but waited until early in the trial to reveal them.[32] There is nothing in *Brady* or *Agurs* to require that

[32] Defendant Janicki also apparently claims that the government did not ultimately turn over all exculpatory material relating to

such disclosures be made before trial, and we have explicitly held this in the past. *United States v. Stone*, 471 F.2d 170, 173-74 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). *See also United States v. Lomprez*, 472 F.2d 860 (7th Cir. 1972), *cert, denied*, 411 U.S. 965 (1973). Thus, even though evidence might be material or might create a reasonable doubt as to guilt, Due Process, albeit requiring eventual disclosure, does not require that in all instances this disclosure must occur before trial.

The appropriate standard to be applied in a case such as this is whether the disclosure came so late as to prevent the defendant from receiving a fair trial. *See United States v. Stone*, 471 F.2d at 174. After considering the record and the claims of prejudice forwarded by the defendants, we cannot say that this disclosure came so late as to violate Due Process.

The defendants, apparently relying on their misinterpretation of *Brady* as a constitutional mandate for pretrial discovery, concentrated on the exculpatory nature of the evidence and barely developed before this court any specific ways in which they were prejudiced by this delay.[33] McPartlin merely argues that, had the Benton embezzlements been revealed before trial, "specific requests could

specific instances of embezzlement: "the Government may have secured information about particular instances of embezzlement about which the defendant was unaware. . . ." Brief of Defendant Janicki at 32. However, a denial of Due Process cannot be premised on the defendant's mere conjecture that there might have been favorable evidence which was undisclosed. The existence of the evidence must be established, and here the defendants offered nothing to rebut the government's assertion that it had turned over to the defendants all its information on the embezzlement.

[33] At trial the defendants made only generalized claims of prejudice without advancing any specific theories upon which a finding of prejudice might be based. Tr. at 230-31 (Janicki), 249-50 (McPartlin). Such specific theories were advanced for the first time in the briefs submitted to this court.

have been directed toward more detailed information concerning these -embezzled] funds. . . . A thorough investigation into the disposition of those funds which he admittedly retained might have revealed that additional funds were similarly expended, deposited or hidden." Brief for Defendant McPartlin at 34-36. It is difficult for us to discern any undue prejudice on this basis. To begin with, there was nothing to preclude the defendants from having made additional investigations between the time of the disclosure and the close of the evidence almost two months later, and yet nothing in the record reveals that defendants directed any further inquiries to Benton. This omission is even more important given the statement of the trial court that it would reconsider the defendant's motion for a recess if it later became apparent that "anyone has in fact been prejudiced by late disclosure." Tr. at 250. Nor did the defendants subsequently renew their request for a continuance. Thus, given the failure of the defendants to pursue adequately any subsequent investigation and their subsequent failure to request additional time for any investigation thoroughly discredits their assertion that they were prejudiced by the timing of the disclosure.

V.

Admission of Benton's Desk Calendars

At trial the government introduced as exhibits over the objections of the defendant, the desk calendar-appointment diaries of William J. Benton described above, Part I, B, 1. These diaries documented in some detail the dealings of Benton with the Chicago defendants. As a foundation for admission of the diaries, Benton testified that he had kept such business diaries since 1952 or 1953 and that he maintained these diaries during the period of his dealings with Metropolitan Sanitary District officials. Benton further testified that he kept these diaries and made entries in them as a regular part of his business activity as a vice-

president of Ingram Corp., noting in them anticipated meetings, telephone calls, personnel matters and bids. These entries were characterized by Benton as "things which I would need to look back on," to recall a bid or to prepare letters and memoranda, for example.

In admitting the diaries the trial court made the following findings:

> It was the regular course of business for Mr. Benton to make entries in diaries about the things he did during the course of a business day, where he went, what people said to him, what commitments he made and what commitments were made to him in connection with that business. The entries that are contained in the diary, in the series of diaries, do pertain to Ingram's business.

The contents of the diaries further indicated their reliability to the district court:

> I find no indication of a motive to falsify. At the time these entries were made back in 1971 and 1972, there is not the slightest bit of evidence to suggest that Mr. Benton thought this scheme was going to be disclosed; that he thought that he would be caught. There is nothing self-serving about these entries. They implicate Mr. Benton in serious criminal misconduct. Indeed, if he were unavailable, I think these diaries might well be admissible as statements against penal interest, so incriminatory are they of Mr. Benton.
>
> So I think they have the earmarks of reliability in that sense.

We agree with the district court that these diaries were admissible. These diaries clearly fulfilled all the requirements which justify the admission of business records under Federal Rule of Evidence 803(6). These records were kept as part of a business activity and the entries were made with regularity at or near the time of the described

event. Most importantly these diaries satisfied the central rationale of the business records exception: since Benton had to rely on the entries made, there would be little reason for him to distort or falsify the entries.

The application of the business record exception to documents differing greatly from the classic "shopbook" or business ledger is well established. *See, e.g., United States v. Reese,* 568 F.2d 1246 (6th Cir. 1977) (scrapbook of press clippings compiled by public relations department); *United States v. Yates,* 553 F.2d 518 (6th Cir. 1977) (letter from bank to employees describing recent robbery); *Magnus Petroleum Co. v. Skelly Oil Co.,* 446 F. Supp. 874 (E.D. Wis. 1978) (corporate officer's personal notes of business negotiations); *Aluminum Co. v. Sperry Products, Inc.,* 285 F.2d 911, 916 (6th Cir. 1960), *cert. denied,* 368 U.S. 890 (1961) (inventor's diary of progress on invention). Moreover, the business record exception has been applied to admit documents indistinguishable in kind from Benton's desk calendars. In *United States v. Evans,* 572 F.2d 455 (5th Cir. 1978), the court permitted the introduction of "pocket-size appointment calendars known as 'daytimers.' " *Id.* at 487. The court noted in support of its holding that these calendars were business records that "the entries purport on their face to list . . . business entertainment expenses . . . [and] such documents were used as a matter of company policy." *Id.* at 488. Likewise, the calendars here on their face describe business matters and, even if not mandated by Ingram policy, were kept in accord with the widespread practice of business executives to maintain such records.

Defendants McPartlin and Weber have argued that several facts differentiate the records here from admissible business records. First, the defendants stress that some of the entries in the calendars were made out of sequence. The defendants' document expert testified that fifteen entries out of all those made over a two-year period were made out of sequence. We do not however agree with the

defendants that nonsequential entries preclude admissibility as business records. Although there is no dispute that Benton's entries in a few cases did not proceed page by page in the book, the defendants' document examiner could not disprove Benton's statements that entries were made at or about the time of the described event.[34] Indeed, it seems to us that insisting that entries proceed methodically from the first to last page is as pointless as insisting that ledger and account entries proceed in alphabetical order or from top to bottom. As long as the entries satisfy the contemporaneity and regularity requirements, their sequence is irrelevant. This point was made clear by the Tenth Circuit in *United States v. Carranco,* 551 F.2d 1197 (10th Cir. 1977). There the defendants attempted to block the admission of freight bills on the ground that some of the notations on the bills occurred after the document had been completed by the freight originator. The court rejected this argument noting:

> The notations on the freight bill were explained by the witnesses, and this is probably more than is required by the business records exception to the hearsay rule. As pointed out by the appellee, a freight bill is not meant to be a static document nor is it used as such. As testified to by those familiar with the shipping business, a freight bill is used by many different people and it is their job to make notations on the freight bill so it will continue to be an accurate description of the shipment. It was adopted by ICX as its record, in the regular course of its business, when

[34] The defendants have also attacked the contemporaneity of the entries, arguing that the records were inadmissible because entries were made relating to appointments before the appointment took place. This is an overly narrow construction of "at or near the time." Even though such entries were not made "at or near the time" of the meeting they were "at or near the time" the appointment was made. This seems to be sufficient contemporaneity to constitute a business record documenting the making of appointments.

> the ICX driver signed it as he picked up the interline shipment. He used it as an ICX record, verified the shipment, and made the notations on it. The notations as testified to by the witnesses were thus also made in the regular course of business of ICX. One of the freight bill copies went into the ICX terminal records, and one or more copies continued with the shipment. The requirements of Rule 803(6) of the Federal Rules of Evidence were met.

Id. at 1200. Similarly here there is no reason to require that an appointment calendar remain a "static document"; indeed as appointments and other matters change the calendar to be useful must be nonsequentially revised. The only requirement is that these revisions be contemporaneous and regular, and the defendant's proof of simple nonsequentiality does not rebut Benton's testimony that the entries were made regularly and contemporaneously. However, even if several of the entires were made noncontemporaneously, it remains within the district court's discretion to determine whether the few non-contemporaneous entries so undermine the reliability of the record as to preclude admissibility. Given that there were only fifteen non-sequential entries over a two year period, even if many of these were shown to be noncontemporaneous, we could not say that this discretion was abused.

The defendants also urge that these diaries could not be business records because they were relied on by no one other than Benton and in any event contained many entries of a purely private nature, *viz.,* The alleged extortion scheme engaged in by Benton which supposedly was not related to Ingram Corporation's official business. However, nothing in the text or comments to the Rule provides any indication that a necessary prerequisite to the reliability of a business record is verification by persons other than the one making the entry. Indeed, the Advisory Com-

mittee Notes appear to suggest otherwise:

> The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

Certainly the second and fourth, and possibly the first, indicia of reliability contemplate only the accuracy imposed by the record keeper on himself. Accordingly, admissibility has been upheld even in instances in which the records were made only for the benefit of the record keeper himself and not for the benefit of the entire business entity. *See United States v. Prevatt*, 526 F.2d 400, 403 (5th Cir. 1976); *Aluminum Co. of America v. Sperry Products, Inc.*, 285 F.2d 911, 916 (6th Cir. 1970), *cert. denied*, 368 U.S. 890 (1961).

Nor do we consider it significant that the illegality of Benton's activities may have removed these actions in some technical sense from a narrow construction of his duties at Ingram. This argument proceeds on the false premise that because Benton's activities were not a part of Ingram Corporation's business, they could not be a business at all. *United States v. Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964), addressed, and rejected, such a contention. There the defendant after having gained control of a company, engaged in a fraudulent scheme for the distribution of that company's securities for his own personal benefit. The court was unpersuaded that records relating to that scheme, since they were not part of the company's business, could not constitute business records. The court pointed out that the defendant, "while distributing a huge block of control stock to the investing public through a complex system of brokerage accounts and over-the-counter sales, was engaged in a 'business,'" albeit a

business of his own and not the company's. *Id.* at 313. The court further rejected the notion that business records would lose admissibility as such because of the illegality of the underlying business. We think that the same rationale applies here. Benton was engaged in systematically negotiating under-the-counter payments either for himself or the Chicago defendants in order to facilitate the award of business contracts. Although this is not a business of "the usual orthodox nature" (*id.*), there is no question that this bribery scheme was as much a business as a fraudulent securities-marketing scheme.

However, even if there were to be some queston as to whether Benton's activities constituted an independent business, we believe that his activities can also be characterized as part of Ingram's business. As long as the recorded activities had become, properly or not, an integral part of Benton's business activities for Ingram, the records are not too personal to preclude admissibility under this exception. In this matter we are persuaded by *United States v. Schiller*, 187 F.2d 572 (2d Cir. 1951). There the defendant, a government employee in the Rent Control Program, maintained a diary which evidenced a bribe paid to him. The court, in refusing to consider a Fourth Amendment challenge to the admission of the diary premised on the personal, non-official nature of the papers, noted:

> We think . . . there was a sufficient showing that the entries introduced in evidence dealt with official duties. Such matters as rent adjustments and recommendations regarding the same were within his general duties, *whether he performed them rightly or wrongly*, as lunch or elsewhere. . . .

187 F.2d at 575 (emphasis supplied). Certainly if such papers have sufficient business character to remove them from the personal paper protections of the Fourth Amendment, they have sufficient reliability to permit admissibility.

Defendants finally rely heavily on *Buckley v. Altheimer*, 152 F.2d 502 (7th Cir. 1945) in support of their position. In *Buckley*, this circuit declined to permit, under the business record exception, the admission of a diary which contained entries documenting the amount of indebtedness between two parties, Frost and Altheimer. The court, in denying admission, noted that "[t]he book did not contain any regular set of entries relating to any accounts between Frost and Altheimer." *Id.* at 507. It was argued that, although no claim was made that the entries in the diary occurred in the regular course of business and was "informally kept," the diary should have been admitted because the entries were made "precisely and meticulously." *Id.* The court rejected this argument, stating that "private diaries as distinguished from account books or individual memoranda of particular transactions" are inadmissible. *Id.* at 508. It is this latter statement upon which the defendants rely.

We believe however that the defendants' emphasis on the court's language concerning "private diaries" is misplaced. We do not believe that the court there intended to make any *per se* rule precluding the admissibility of private diaries; instead it is clear that the decisive factor in that case was that no regular entries had been made documenting the relationship. The desk calendar before us is clearly a record of a different order: regular and frequent entries documenting the relation between Benton and Sanitary District officials were made systematically for the purpose of allowing Benton to rely on its accounts of the status of the relationship.

We note as a final matter that even if any of the defendant's arguments were sufficient grounds to prevent admission of these diaries under the business record exception, they would be admissible under two other exceptions. First, they would be admissible under the "residual"

exception, Federal Rule of Evidence 803(24).[35] A number of factors combine to demonstrate the reliability of the entries: the highly self-incriminatory nature of the entries themselves, the regularity with which they were made, Benton's need to rely on the entries. Where evidence complies with the spirit, if not the letter, of several exceptions, admissibility is appropriate under the residual exception. *See generally, United States v. Ianconetti*, 406 F. Supp. 554 (E.D.N.Y.), *aff'd*, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (especially Judge Weinstein's opinion for the district court). Furthermore the degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule. Second, these calendars would also be admissible under Rule 801(d)(2)(E) as statements "by a co-conspirator of a party during the course and in furtherance of the conspiracy." Since these entries were made so that Benton could rely on them in carrying out his scheme, they aided and were "in furtherance of" the conspiracy. *See United States v. Evans*, 572 F.2d 455 (5th Cir. 1978).

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[35] Rule 803(24) provides:

> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

VI.

Weber's Prior Consistent Statements

The government's evidence revealed that the first installment of the bribe money consisted of $75,000 given to McPartlin in Weber's presence. Some part of that amount consisted of thousand-dollar bills. The government further presented evidence to establish that three days after this cash payment, Weber deposited nine thousand-dollar bills in the bank account of one of the companies controlled by Weber. Weber, in an attempt to rebut the damaging inferences that could properly to be drawn from such a cash deposit, testified that he obtained this money from a safe-deposit box maintained by himself and his mother. His mother testified that they indeed had such a joint safe-deposit box and that it did contain several thousand-dollar bills. As further corroboration, Weber sought to introduce the testimony of his accountant, as well as the accountant's copy of the bank statement recording the deposit. In an offer of proof Weber indicated that the accountant would testify that in 1973, two years after the deposit, Weber told him, in connection with his preparation of an IRS audit, that the funds were obtained from Weber's mother. The proffered bank statement contained the accountant's notation next to the sum: "Overdraft covered and paid in cash from Mother (per FNW)." The trial court refused the admission of the accountant's testimony and his copy of the bank statement. Defendants McPartlin[36] and Weber urge that this was error.

[36] McPartlin argues that evidence denying Weber's participation in the first bribe installment would have inured to his benefit since the original installament was alleged to have been delivered to McPartlin in Weber's presence. Thus, presumably, any cash deposited by Weber, if not from innocuous sources, would have been obtained from McPartlin. We do not think, however, that any benefit from such evidence would have been sufficient to have made its exclusion a denial of a fair trial to McPartlin. The fact Weber may not have received a cash rake-off from this first installment in no way detracts from the credibility of testimony that McPartlin received the money; at most such evidence would have only contributed to a demonstration of McPartlin's penuriousness.

Two theories of admissibility are advanced. First, it is argued that the evidence was admissible under Federal Rule of Evidence 801(d)(1)(B) as a prior consistent statement.[37] We do not believe, however, that these statements were admissible under this theory. Evidence offered under this theory must have some probative value in rebutting the implied charge of recent fabrication or improper motive. However, where a motive to falsify also existed at the time of the earlier statement, it possesses no such probative value. As Judge Weinstein correctly pointed out in his treatise on the Federal Rules:

> Substantive use under Rule 801(d)(1)(B) is limited to situations where high probative value is most likely. . . . Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force "for the simple reason that mere repetition does not imply veracity."

4 J. WEINSTEIN & M. BERGER, EVIDENCE ¶801(d)(1)(B)-[01] at 801-1OO (1977). Obviously Weber would have had no more reason to tell the IRS that the proceeds were illegal bribes than he has a motive now to tell that to a jury in a criminal prosecution. Indeed, Weber would have even had a further reason not to tell the IRS that the $9,000 was part of a kickback: a bribe would be includable in Weber's gross income whereas an appropriation of jointly-held funds might not have been. Thus, we do not feel

[37] Rule 801(d)(1)(B) provides that

> (d) A statement is not hearsay if . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . .

that these prior statements were admissible under 801(d)(1)(B).

As a second ground of admissibility, Weber and McPartlin urge that the bank statement was admissible as a business record under Federal Rule of Evidence 803(6). This argument creates a paradoxical tension with their arguments that Benton's desk calendars were not business records. The defendants assailed the diaries on the grounds that the entries were not made at or near the time of the event related (but recorded in advance as reminders of appointments) and that many of the entries were derived from "second or third-hand information." Brief for Defendant Weber at 7. Yet the defendants urge that a single notation of a cash transaction made more than two years after the transaction and based solely on information supplied by someone other than the person making the entry constitutes a business record. We do not rely on these two grounds, however, to uphold the exclusion of the notation on the bank statement. Instead we find a more fundamental flaw in this evidence: this notation, unlike those in Benton's diaries, was not made for future reference and reliance but was made in anticipation of IRS litigation. The defendants appear to admit this fact, and the trial judge was informed of this. (Tr. 1363-69). As such prelitigation records, we hold that they lacked sufficient trustworthiness to permit admissibility. Indeed, this case is not significantly distinguishable from *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954), which was cited by the Advisory Committee Notes to Rule 803(6) as an example of insufficient trustworthiness. In *Hartzog* the court held it was error to admit the worksheets of an IRS agent, deceased at the time of trial, that had been prepared from his examination of the defendant's records in preparation for a tax-evasion prosecution. The court explained the reasons for finding insufficient trustworthiness as follows:

> These worksheets were made in preparation for this prosecution; they were Baynard's [the agent's] personal working papers, were the product of his judgment and discretion and not a product of any efficient clerical system. There was no opportunity for anyone . . . to tell when an error or misstatement had been made. These worksheets were not more than Baynard's unsworn, unchecked version of what he thought [the defendant] Hartzog's records contained.

Id. at 710. The records made by Weber's accountant are no more trustworthy than those prepared by the agent in *Hartzog:* they were prepared as a matter of his judgment and discretion; they were not produced as part of any regular system; there was no reliance on these notations by the accountant or others to guard against error or misstatement. If anything, the records in this case are less trustworthy since, unlike *Hartzog* where the agent examined records that the defendant had prepared for his own use, these notations were the product of Weber's own representations for the purposes of the audit, thereby furthering the possibility of misstatement. Accordingly, we hold that the trial court properly exercised its discretion to exclude these records.[38]

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[38] Further support can also be found in this circuit's decision in *United States v. Ware*, 247 F.2d 688 (7th Cir. 1957), also cited by the Advisory Committee as a proper application of the untrustworthiness principle. In *Ware* this circuit held that records of drug purchases made by a drug agent where inadmissible in subsequent prosecutions, noting that "such utility as . . . [these records] possess relates *primarily* to prosecution of suspected law breakers and only *incidentally* to the systematic conduct of the police business." *Id.* at 700 (emphasis supplied). Likewise, the notations here must be seen as relating primarily to the avoidance of additional tax liability or prosecution as a result of an audit and only incidentally to the conduct of Weber's business.

PELL, *Circuit Judge:*

I concur in the portions of this opinion prepared by Judges Tone and Sprecher.

VII.

Weber's Political Acquaintances

Henry Weber, brother of Franklin Weber, called as a Government witness, was permitted to testify on direct examination without objection that his brother Franklin was an acquaintance of Clyde Choate. He was then asked whether his brother was an acquaintance of Paul Powell to which he also responded in the affirmative. An objection was made, without any specificity, following the answer as to Powell. There was no motion to strike the answer and the "objection" as such was overruled. No effort was made at the time to demonstrate to the trial judge any particular basis for the objection.

Subsequently during redirect examination Weber moved for a mistrial on the basis of the Powell matter because "[i]t was highly predjudical and has no relation whatsoever to this case." The court in denying the motion, properly from our examination of the record, observed that:

> the reason I let that in is that you cross examined several witnesses about whether or not there was any reason to believe Mr. Weber had any political connections, whether it was credible to believe that he knew anybody, and there again, that is something you opened up.

Without specific reference to Powell, Weber again moved for a mistrial following final argument. He now says that which he didn't say to the court specifically that on the basis of Fed. R. Evid. 404(b) the testimony as to Powell was improper and prejudicial in the light of widely-circulated publicity of wrongdoing on the part of Powell when he was Secretary of State of Illinois. Certainly in any

trial and particularly in a complex trial involving numerous defendants such as the present case, a lawyer should make clear to the trial judge the exact nature of the claimed prejudice, which was not done here. Even, however, if we assume what probably was a fact that the notoriety given to the Powell case some seven years earlier was such as to make it clear why Weber's attorney did not want his client linked with Powell, we agree here with the district court that the door had been opened. Weber, not the Government, portrayed political associations, which he sufficiently indicated he did not have, as a unique requirement for accomplishing that with which Weber is charged.

For the court to admit relevant evidence in rebuttal on the subject was well within its discretion. *See United States v. Eliano,* 522 F.2d 201 (2d Cir. 1975); *United States v. Jones,* 438 F.2d 461 (7th Cir. 1971). C. Wright and K. Graham, *Federal* § 5241. The purpose of Rule 404(b) is to prevent "the use of alleged particular acts ranging over the entire period of the defendant's life [making] it impossible for him to be prepared to refute the charges, any or all of which may be mere fabrications." 2 J. Weinstein, *Evidence* ¶405 [04], at 405-39, *quoting* Wigmore, *Evidence* § 194. The defendant focused the proof on this issue and cannot complain of surprise if evidence of his political associations was introduced.

VIII.

Henry Weber's Grand Jury Testimony

Franklin Weber also objects to the admission of his brother Henry's grand jury testimony at trial. Henry Weber testified on direct examination that he went to Vaduz, Liechtenstein, to negotiate two letters of credit given to him by the defendant. During the course of the direct examination, the Government attempted to introduce Henry Weber's inconsistent grand jury testimony that he

had never gone to Liechtenstein, testimony given two weeks after his return from that country at the first of his two appearances before the grand jury. The court would not admit the testimony on direct examination, however, on the basis that the trial jury might unfairly infer that the defendant had somehow been responsible for his brother's falsehoods. When cross-examined by the defendant, Henry explained that because he was by coincidence going to Europe, he negotiated the letters of credit as a favor to his brother. Henry also testified that the defendant had told him the letters "covered sale commissions for oil or Arabian interest or something." The trial court then permitted the Government to introduce the grand jury testimony on redirect examination, and the defendant argues that the evidence still created the prejudical impression that Franklin Weber forced his brother to testify falsely.

Weber's argument that the admission of this evidence was a prejudicial linking of the brothers Weber, however, shifts the focus from the basis on which the evidence was properly admitted. As the district court pointed out there need be no connection between Franklin Weber and the giving of the false testimony to the grand jury for that testimony to be admissible.

The trial court properly admitted the statement as nonhearsay, Fed. R. Evid. 801(c); *see Anderson v. United States*, 417 U.S. 211, 219-21 (1974), to rebut the theory of the defense raised by the defendant during cross-examination. During cross-examination, the defendant did not attempt to rebut the Government's showing on direct examination that Henry Weber negotiated the letters of credit. The defendant instead attempted to impose upon the transactions the appearance of innocence. Once the defendant, again opening a door, attempted to create this impression, the testimony became significant as rebuttal

merely because it was given, and not for its truth.[39] The grand jury testimony, viewed with other admissible evidence showing that it was false, tended to establish that Henry Weber was aware that he was involved in improper transactions. *See id.* at 220.

In his reply brief, Weber argues that the Government has resorted to mere rules of impeachment to justify the introduction of the grand jury testimony. It is true that as a secondary justification the Government, citing Fed. R. Evid. 607, argues that it could properly impeach its own witness, although Weber does not argue otherwise.[40] Although the impeachment aspect is one which enters the present picture, this aspect appears neither to be the prime thrust of the Government's position nor the basis on which the trial court admitted the evidence. As the trial judge pointed out when the impeaching testimony was being discussed, the cross-examination by Franklin Weber was designed expressly to bring out that this was a routine transaction that the witness was conducting for his brother, nothing was wrong with it and there was no reason to suspect it. The judge then pointed out:

> You didn't have to do that. I had earlier ruled that this [impeaching testimony] would not be admissible.

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[39] The Government's theory of the case was that Henry Weber did go to Liechtenstein to negotiate the letters of credit. Henry's negotiation of the letters of credit in Liechtenstein formed the basis of Count 32 of the indictment. Because the Government was not trying to prove the truth of the out-of-court statement, the defendant was not prejudiced by lack of cross-examination at the time of the grand jury testimony. *Anderson v. United States*, 417 U.S. at 220-21.

[40] The Government also points out that pursuant to Rule 613(b), the witness was permitted on recross-examination to explain the impeaching grand jury testimony by stating that he had been unfamiliar with the geography of Liechtenstein and because of that he had not understood the question at the time of his first grand jury appearance.

> Having opened it up, I think the Government is now entitled to show that two weeks after the returned from Liechtenstein—and I hadn't realized that it was that soon that he appeared before the Grand Jury—this witness said he had never been to Liechtenstein.

We agree with the district judge that the evidence was properly admissible through the open door.

IX.

Denial of Effective Assistance of Counsel

A second aspect of the Swiss letters and Henry Weber's various connections therewith is the basis for a claim that Franklin Weber was denied effective assistance of counsel. The gist of the claim is that evidence pertaining to the Swiss letters in addition to that discussed in Part VIII of this opinion not only further linked Franklin Weber with his brother's first grand jury testimony but also constituted such a challenge to the integrity of Franklin Weber's trial lawyer as to deny the defendant effective assistance of counsel.

Specifically, the proof to which the objection is directed is the testimony, presented during the Government's rebuttal, of Assistant United States Attorney Michael O'Brien, who had conducted the preliminary grand jury investigation. The testimony described the following sequence of events: About a week after Henry Weber testified truthfully before the grand jury on December 3, 1975, his second appearance, that he carried the letters of credit to Liechtenstein, Franklin Weber's attorney had called Government counsel to report his client's possession of other letters of credit. During closing argument, the prosecutor suggested, "isn't it interesting that after Henry Weber has all this recollection, then everybody is calling up and telling the Government about it, after the cat is out of the bag." The defendant argues that this statement implied that defense counsel engaged in wrongdoing and

therefore denied the defendant assistance of counsel. This argument is completely without merit. The cases cited by the defendant, *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. [illegible] and *Zebouni v. United States*, 226 F.2d 826 (5th Cir. 1955), concerned continuous derision of the defense attorney by the trial judge and are not in point. Furthermore, we have difficulty seeing how this testimony and final argument disparaged defense counsel. The Government's questioning and argument were obviously for the purpose of rebutting the defendant's exculpatory evidence that Franklin Weber had not learned of of the grand jury investigation until "very recently," and that he had been suspicious of the purpose behind the letters of credit, and that he therefore directed his attorney to notify the United States Attorney that he possessed more letters of credit.

We find no error in the admission of the rebuttal evidence. It was for the jury to draw such inferences as the evidence properly supported on the issues to be determined by the jury. The admission of this evidence properly bearing on what amounted to an assertion of a defense does not by any stretch of the imagination so impugn the defendant's attorney as to make his assistance ineffective to the prejudice of his client. We find no suggestion in the record that the attorney had the information with respect to the letters any sooner than he provided the information to the Government.

X.

Judge's Comment during Weber's Testimony

Franklin Weber finally argues that a comment by the trial judge during his testimony constitutes reversible error. The defendant testified, "I can swear that I did not see Mr. Benton give him anything. . . ." The trial judge then said in the presence of the jury, "that is what you

are doing in everything you say. You understand that." Thereafter the matter was brought to the attention of the judge by way of a motion for a mistrial in which it was claimed that Weber's credibility was seriously depreciated in the eyes of the jury. The court immediately stated that the remark was not intended in any such way and offered to make that clear to the jury.

The judge did fully explain to the jury that in reflecting upon the matter he thought he should not have made the statement and that he in no way intended to reflect or comment on Weber's testimony or indicate any attitude whatsoever about the testimony. The judge also in final instructions made it clear that any comment by the court was not intended to invade the jury's province to decide the facts.

Weber, while not challenging the completeness of the court's curative instruction, argues that it did nothing to heal an incurable situation, stating that "A placebo cannot cure a terminal condition." In candor, we regard this hyperbolic characterization as a desperate bit of straw grabbing. In the first place we would have had difficulty even absent the curative instruction reading this remark as any indication that the judge was expressing disbelief in the defendant's testimony. The judge, however, made it abundantly clear, if there had been any doubt, by his curative instruction that there was no reflection on the witness's credibility. In any event, this was an isolated incident in a long and complex trial. Weber testified for two full days during which the jury had ample opportunity to formulate its opinion of his credibility without regard to what was at most an oblique passing remark by the judge. Courts generally, and properly, decline to reverse in comparable situations. *See, e.g., United States v. Cardall,* 550 F.2d 604, 606 (10th Cir. 1976), cert. denied, 434 U.S. 841 (1978); *Gordon v. United States,* 438 F.2d 858, 862-63 (5th Cir.), *cert. denied,* 404 U.S. 828 (1971); *United States v. Allen,*

431 F.2d 712, 712-13 (9th Cir. 1970); *United States v. Wilkins,* 422 F. Supp. 1371 (E.D. Pa. 1976), *aff'd sub nom. Appeal of Smith,* 547 F.2d 1164 (3d Cir. 1976), 547 F.2d 1166 (3d Cir. 1976), 559 F.2d 1210 (3d Cir. 1977).

As the Supreme Court stated in *United States v. Glasser,* 315 U.S. 60, 83 (1942):

> [An] examination of the record as a whole leads to the conclusion that the substantial rights of the petitioners were not affected. The trial was long and the incidents relied on by petitioners few. We must guard against the magnification on appeal of instances which were of little importance in their setting.

XI.

Sufficiency of Evidence as to Edwin Bull

The defendant Edwin Bull argues that the evidence against him was insufficient to sustain a conviction for conspiracy because of an absence of evidence showing that he had knowledge of the illegal purposes of the conspiracy. He argues that the statements of co-conspirators connecting him to the conspiracy were improperly admitted against him, and that if these inadmissible statements had been excluded, his conviction could not stand.

Bull's theory of defense was that he was merely a "friendly and accommodating" businessman who earned a finder's fee and a subcontract by introducing the Ingrams to the contract opportunities available at the Sanitary District. Especially damaging to this defense, however, was testimony admitted at trial of conversations between Bull's alleged co-conspirators concerning Bull's role in the conspiracy. Benton testified, for example, that prior to receiving the contract, Ingram was having trouble generating sufficient cash to meet the demands of Sanitary District officials. When Weber learned of this problem, he instructed Benton to write a check for $25,000 (the amount

then demanded) payable to "Mr. Bull's company, Bull Towing Company, and that Mr. Bull would handle this check and convert it into cash and take care of the staff of the Sanitary District." Bull argues that without this statement the evidence merely shows that he deposited a check from Ingram for $25,000 in the No. 3 Bull Towing account and drew a countercheck for the same amount and received cash. Bull also declared this sum on his corporate and personal income tax returns and paid the necessary taxes. According to Bull's brief, "[t]here is not a scintilla of evidence that any of these monies reached anyone else." We hold that the co-conspirators' statements connecting Bull to the conspiracy were admissible under Fed. R. Evid. 801(d)(2)(E) and that the evidence against Bull was adequate to sustain the conviction.

Rule 801(d)(2)(E) provides that statements of a coconspirator made during the course of and in furtherance of a conspiracy are not hearsay. In *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1978), we held that the trial court alone should decide, as a question of competence under Rule 104(a), the preliminary question of whether the proponent has submitted sufficient proof that there was a conspiracy before admitting a co-conspirator's statement under Rule 801(d)(2)(E). For the statement to be admissible, we held that this preliminary showing must satisfy the preponderance of the evidence standard, and that the trial court's determination of admissibility is final as to admissibility.

The proceedings below, however, took place prior to our decision in *Santiago*, at a time when there were ambiguities in the law about who was to decide co-conspirator preliminary questions and by what standards. *See generally*, 1 J. Weinstein, *Evidence* ¶104[05]. In *Santiago* we noted that in this circuit the former standard for determining the admissibility of co-conspirators' statements committed the question to both judge and jury. The trial court would

admit the statement if the proponent made a prima facie showing, on the basis of evidence other the statement, that there had been a conspiracy. The jury, however, was instructed not to consider the statement against another defendant unless they found, beyond a reasonable doubt, that the evidence other than the statement showed that a conspiracy existed and that the other defendant was a member of the conspiracy. *See also United States v. Rizzo*, 418 F.2d 71 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970); *United States v. Santos*, 385 F.2d 43 (7th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968).

The trial court in this case proceeded substantially according to the prior standard, described in *Santiago*.[41] Bull, however, relying on *Saniago* language, which, of course, was not available to the trial judge here, seizes upon a part of the court's instructions given during the course of the trial in connection with the admission of testimony of statements of alleged co-conspirators. It is true that the judge did say that the jury could consider such statements on the question of whether a conspiracy existed. Bull cites us to criticism in *Santiago* of "the view that the existence of a conspiracy could be proved by the very statement for which admission is sought." 582 F.2d at 1133 n.11. That was done here, he argues, and constituted "bootstrapping" proof which had been condemned by earlier cases.

This argument however, taking language of the instructons out of context, ignores the clear and explicit admonitions of the court during the course of the trial that as to any particular charged co-conspirator it was essential that he be proved a participant in the conspiracy by in-

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[41] Although the record is not clear, we assume arguendo that the trial court, in letting in the statements, applied the lesser prima facie standard then used for determining the existence of a conspiracy for purposes of admission, rather than the stricter preponderance test prescribed in *Santiago*.

dependent evidence before statements of others could be considered on the question of his liability.

Thus, on the first occasion during the trial that the subject was addressed, which was early in the trial, the judge instructed as follows:

> There are two fundamental questions that you have to decide in regard to the conspiracy count of the indictment. The first of those questions is what is the conspiracy that is alleged by the indictment to have existed? Was there such a conspiracy? On that question you consider all of the evidence that I allow in and you make up your minds at the conclusion of the case as to whether a conspiracy, as alleged in the indictment has been shown to exist as between somebody.
>
> The second question is—and it is eight separate questions here—was this particular defendant shown to have been a member of that conspiracy. On that second question which you must answer in regard to each defendant, only those acts of that particular defendant should be considered to answer that question. You can't decide that Defendant B was a member of the conspiracy, if you find there has been a conspiracy, on the basis of something Defendant A said. It has to be on the basis of what you find Defendant B said and did.
>
> Those are the two questions, and let's just assume, generally speaking, that a jury in a hypothetical case finds Defendant B to have been a member of the conspiracy. All right, then and only then are the statements and actions of his alleged co-conspirators admissible against him, provided they are acts and statements which the jury finds were committed in furtherance of the objectives of the conspiracy.
>
> So, to recapitulate, question one, was there a conspiracy? Question two, was Defendant B a member of that conspiracy? Question three, as to any acts or statements of an alleged co-conspirator in considering whether you are going to consider that against Defendant B, was that act or statement committed in furtherance of the common conspiracy?

> Only if you answer all three of those questions in the affirmative can you consider this act or statement of, say, Defendant A against Defendant B.

On analysis, all that the district court was really saying as to the establishment of a conspiracy was as follows: If there was testimony as to a conversation between B and C which reflected an agreement to violate the law, this testimony would be admissible as to B and C and would, if believed by the jury, tend to establish a conspiracy as to B and C. If during the course of the conversation either B or C had spoken of A's participation this would not have been proof of A's participation unless and until it had already been established by independent evidence, other than the statements of co-conspirators, that A was a participant.

While the quoted portion of the instructions above was perhaps repetitive, and we note its substance as to the necessity for independent evidence as to any particular defendant becoming a conspiracy member was repeated thereafter, it is evident that the trial judge was attempting to make absolutely clear to the jury by repetitive emphasis that the statements of others could not be considered against a defendant for finding him to be a participant in a conspiracy unless his membership had been otherwise independently established. From the record we regard this attempt by the judge to have been successful.

In sum, we fail to see any prejudice to Bull. The instructions on conspiracy as in the case of all instructions must be considered in the whole complex of instructions, and it was made perfectly clear to the jury by those instructions that even though a conspiracy had been established by all of the evidence which the court had admitted, the jury could not find Bull guilty as a conspirator unless his membership in the conspiracy had been established by independent evidence other than the statements of co-conspirators.

Further, and in any event on the record in this case, we are firmly convinced that apart from any statements there was overwhelming independent evidence sufficient to show the existence of a conspiracy. If there had been any error in the instruction it would have been harmless. Fed. R. Evid. 103(a); *Williams v. United States,* 338 F.2d 530 (D.C. Cir. 1964).

Bull disagrees that there was independent evidence linking him to the conspiracy and asserts that the co-conspirators' statements were therefore not admissible against him. As we have said the trial court instructed the jury that it must find beyond a reasonable doubt and on the basis of independent evidence that Bull was a member of the conspiracy before it could consider co-conspirator statements against Bull.

In reviewing the jury's determination of the sufficiency of the independent evidence linking Bull to the conspiracy, we do not weigh the evidence or determine the credibility of witnesses. We will affirm the jury's finding if there is substantial evidence, viewed in the light most favorable to the government, to support it, *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. Buschman,* 527 F.2d 1082, 1085 (7th Cir. 1976), and we therefore turn to an examination of that evidence.

Robert Howson, an Ingram Contractors, Inc., Vice President, testified that Bull came to New Orleans in March 1971 and told him that for a southern contractor like Ingram to get the Sanitary District contract, a political contribution would be necessary. Benton testified that Bull brought Benton and Weber together for a meeting later that month, and that the day after this meeting, Bull told Benton that "if [Benton] agreed with the discussion with Mr. Weber, he felt Ingram would get this contract, there would be no problem, and that he expected to receive $100,000 and Mr. Weber's group $200,000." There was

evidence that Bull deposited a $25,000 check from Ingram, and withdrew the same amount in cash. Although Bull declared the amount on his taxes, there was also testimony that Bull insisted to Benton that his finder's fee from Ingram include reimbursement for the taxes he paid on the check drawn to his company. From this testimony, the jury certainly could infer that Bull did not keep the $25,000, and from Bull's insistence that Ingram be responsible for the taxes, the jury could infer that Bull's laundering of the check was a favor for Ingram, to whom Bull had earlier suggested the need for political contributions in exchange for a contract. The testimony also showed that Bull's involvment in the bribery scheme continued. When insisting on an increase in his subcontract rates, Bull was reminded by Benton in January 1975 "that this contract extension was a similar situation with the original contract and that Ingram did not retain all of the increase that would be reflected between the various unit prices in the two agreements."

We have already found that the evidence that a conspiracy existed was overwhelming. In *United States v. Robinson,* 470 F.2d 121 (7th Cir. 1972), we noted that once the existence of a common scheme is established, very little may be required to show beyond a reasonable doubt that a particular defendant became a party. *See also United States v. Harris,* 542 F.2d 1283 (7th Cir. 1976), *cert. denied,* 430 U.S. 934 (1976). From the evidence of Bull's independent acts and statements, the jury was entitled to find beyond a reasonable doubt that Bull was a member of this conspiracy, and the jury therefore was entitled to use the statements of other conspirators against him.[42] The discriminating conclusions of guilt and

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[42] Although our decision in *Santiago* commits this admissibility question to the court in the future, we nevertheless apply the then current standards to evaluate the procedures at trial. The defendant has not challenged the submission of the admissibility

innocence returned by the jury in this complex case demonstrate that the jury studied the evidence with great care. *See United States v. Kaufman*, 429 F.2d 240, 244 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970). We decline to disturb their verdict, holding that the independent evidence of Bull's knowing participation in the conspiracy was sufficient to support the jury's use of the co-conspirators' statements against him, and that with such evidence there is no merit in his claim of insufficiency.

XII.

Bull's Claim of Prosecutorial Misconduct

Edwin Bull also argues that during its closing argument, the Government raised for the first time an unfounded inference that he bribed someone in the Illinois Commerce Commission to procure a Certificate of Public Necessity and Convenience for Ingram. Specifically, during closing arguments, the Government attorney made the following statement:

> On July 27, 1971, Frank Weber and Ed Bull went through another series of transactions to generate

---

issue to the jury. Furthermore, we fail to see how this "added layer of fact-finding," although unnecessary, could prejudice the defendant. *United States v. Santiago*, 582 F.2d 1128, 1136 (7th Cir. 1978); *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977).

As we observed in *Santiago*, there is some danger of confusing the jury with the instruction because the judge essentially is telling the jury not to consider the evidence unless it has already found the defendant guilty. *See Carbo v. United States*, 314 F.2d 718, 736 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). We do not regard the instruction as prejudicial, however, because it at least cautioned the jury against the dangers of using this evidence for improper purposes. 1 J. Weinstein, *Evidence* ¶104[05], at 104-45.

> cash very similar to what they did in April, to generate the $25,000. This time the amount involved was $20,000.
>
> Frank Weber made out a Southwest Expressways' check for $20,000, payable to Bull Towing. Bull took it to the bank, deposited it into the Bull Towing Company account, and wrote a check on that amount made payable to himself and received $20,000 in cash.
>
> This occurred on July 27, ladies and gentlemen, the day before Ingram received his Commerce Commission Certificate of Registration.

During rebuttal argument, the Government added:

> Would you put up Government Exhibit 1-12(A).
>
> That is a check from Southwest Expressways to No. 3 Bull Towing dated July 27, 1971, the same day as Government Exhibit 1-12(D) was issued. It is again a check to Ed Bull, and as the evidence indicates, Mr. Bull left the bank with $20,000. Benton had nothing to do with this transaction, but as you have seen from the notes that Mr. Weber wrote, there was apparently some sort of problem at the ICC, Illinois Commerce Commission.
>
> It just so happens that the following day, Ingram is granted their Certificate of Convenience and Necessity by the Illinois Commerce Commission. Well, the bankers and those documents are not ghosts, and they begin to add up.

Bull argues that this suggestion constituted an unconstitutional amendment of the indictment and that it prejudiced unfairly the preparation of his defense. The defendant concedes that the evidence shows he converted a $20,000 check from Franklin Weber to cash on July 27, 1971, but argues that absolutely no evidence supports the implication in the Government argument that he bribed the Commerce Commission.

Although the prosecution, of course, must never refer to matters with no basis in the evidence, *United States v.*

Morris, 568 F.2d 396 (5th Cir. 1978); *United States v. Meeker*, 558 F.2d 387 (7th Cir. 1977), the prosecutor may in argument suggest reasonable inferences from the evidence already admitted. *United States v. Jones*, 482 F.2d 747 (D.C. Cir. 1973). Because of the secret nature of the crime, conspiracy is especially subject to proof by circumstantial evidence. We decline to require the prosecutor to suggest to the jury only conclusions supported by direct evidence.

During the trial there was evidence that the Certificate of Public Necessity and Convenience was granted to Ingram the day after Bull converted the check to cash. Government Exhibit 11-1, a memo made by Weber, also admitted in evidence, indicated that Weber had made payments to the Commerce Commission on behalf of Ingram. On direct examination, Weber testified that he gave Bull the $20,000 check as a payment for a dredge, and during cross-examination the Government confronted Weber with the connection between the memo, the laundered check, and the issuance of the Certificate. Bull did not object to this line of questioning.

These matters admitted in evidence were available to Bull in time to prepare his rebuttal. The conversion of the $20,000 check to cash was one of the overt acts charged in the conspiracy indictment. The documents connected with this line of proof were turned over to Bull's attorney ten months prior to the trial. Bull's argument that this closing statement unfairly prejudiced his defense must therefore fail.

Our examination of the Government's argument and the evidence supporting it also leads us to conclude that the inference created was that Weber, not Bull, bribed the Commerce Commission. The Government therefore did not stray beyond the confines of the scheme alleged in the indictment, which describes Bull in paragraphs 21 and 27

as having been a knowing conduit for the bribery funds. Furthermore, paragraphs 21 and 27 of the indictment describe in broad language the objects of the bribery scheme as "public officers and employees," so that proof of bribes to Illinois Commerce Commission officials was entirely within the scope of the scheme alleged. Bull's argument that any proof involving officials from agencies other than the Sanitary District amended the indictment is therefore without merit. *See Stirone v. United States*, 361 U.S. 212, 218-19 (1960).

XIII.

Claimed Error of Instructions on Travel Act

The defendant Frederick Ingram challenges the portion of the court's instructions pertaining to the counts charging violations of 18 U.S.C. § 1952 (the "Travel Act") insofar as the jury was told that under the Travel Act a defendant need not know or reasonably foresee that the facilities of interstate commerce will be used or that someone will travel in interstate commerce in order to be guilty under the Travel Act. The authority in this circuit is that neither the language nor the purpose of the Travel Act compels this showing of knowledge on the part of each coconspirator. *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976). *See United States v. Feola*, 420 U.S. 671 (1975). The defendant has offered no persuasive reason for a different rule. The use of interstate facilities merely provides the basis for federal jurisdiction. *United States v. Peskin*, 527 F.2d at 78; *United States v. Bursten*, 560 F.2d 779, 783-84 (7th Cir. 1977).

What we have said here in no way indicates that there is not a necessity for interstate travel or the use of an interstate facility. The court did properly instruct the jury that the Government had to prove:

(1) that someone traveled in interstate commerce,

or used an interstate facility in furtherance of the bribery scheme; (2) that a person who caused the travel or use did so with intent to facilitate the bribery scheme; (3) that a member of the scheme thereafter performed or caused to be performed acts to promote the carrying on of the bribery scheme; and (4) that the particular defendant under consideration "was a knowing and willful participant in the bribery scheme at the time of the interstate travel or use of the interstate facility and at the time the subsequent act or acts took place."

The fact that Frederick Ingram did not travel interstate or use interstate facilities or that he may not have known that others in the bribery scheme would do so is immaterial.

The judgments accordingly are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

No. 77-2258, 77-2259, 77-2274, 77-2275 and 77-2280

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT MCPARTLIN, et al.,

Defendants-Appellants.

Before

Hon. Wilbur F. Pell, Jr., Circuit Judge

Hon. Robert A. Sprecher, Circuit Judge

Hon. Philip W. Tone, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 76 CR 779 John F. Grady, *Judge*

This matter is before the court on the petitions for rehearing filed by the appellants, McPartlin, Janicki, Ingram, and Bull. The petitions of Ingram and McPartlin suggested an *en banc* rehearing. The appellant Weber did not file a petition for rehearing.

The court's attention has been directed during the course of considering the petition of appellant Bull to an

inadvertent typographical omission in the sentence beginning on line 5 of page 58 of the slip opinion of this court. Accordingly the opinion is amended with respect to said sentence so as to read as follows:

> When Weber learned of this problem, he instructed Benton to write a check for $25,000 (the amount then demanded) payable to "Mr. Bull's company, Bull Towing Company, and that he and Mr. Bull would handle this check and convert it into cash and take care of the staff of the Sanitary District."

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause as noted above, no judge in active service has requested a vote on the *en banc* suggestion and all of the judges on the original panel have voted to deny rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

Appendix C

No. A-979

FREDERIC B. INGRAM,
Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 22, 1979.

/s/ JOHN PAUL STEVENS
Associate Justice of the Supreme Court of the United States

Dated this 14 day of May, 1979.

Supreme Court, U. S.
FILED
AUG 16 1979
MICHAEL RODAK, JR., CLERK

No. 78-1903

In the Supreme Court of the United States

OCTOBER TERM, 1978

FREDERIC B. INGRAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 595 F. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1979. A petition for rehearing was denied on April 23, 1979 (Pet. App. 75a-76a). Pursuant to an extension of time granted by Mr. Justice Stevens, the petition for a writ of certiorari was filed on June 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly admitted evidence of other similar acts by petitioner as probative of intent pursuant to Rule 404(b) of the Federal Rules of Evidence.

2. Whether the defendant must know or reasonably foresee that the facilities of interstate commerce will be used in order to be found guilty under the Travel Act (18 U.S.C. 1952).

3. Whether the trial court's instruction to the jury concerning petitioner's defense of economic extortion was improper.[1]

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of violating the Travel Act, 18 U.S.C. 1952, and the Wire, Radio, Television Fraud Act, 18 U.S.C. 1343, and of conspiring to commit those offenses in violation of 18 U.S.C. 371. The Travel Act counts charged petitioner with travel in interstate and foreign commerce with the intent to promote and facilitate violation of the Illinois bribery statute. Ill. Rev. Stat. ch. 38, §33-1. Petitioner was sentenced to a total of four years' imprisonment.

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[1]Petitioner also argues (Pet. 20-22) that the district court abused its discretion by denying his motion for severance, and (Pet. 4) that he was deprived of a fair trial by the failure to disclose prior to the commencement of trial certain pretrial statements by a government witness. These questions were raised by petitioner's co-defendants in their pending petitions for a writ of certiorari. We have responded to these questions in our consolidated brief in opposition to those petitions, in *McPartlin* v. *United States*, No. 78-1751, *Bull* v. *United States*, No. 78-1754, and *Janicki* v. *United States*, No. 78-1755 and rely on that response here. We are sending petitioner a copy of that response.

The evidence presented at trial, which is summarized in the opinion of the court of appeals (Pet. App. 2a-12a), showed that petitioner, the chairman of the board of the Ingram Corporation, paid co-defendants McPartlin and Janicki and certain other persons more than $900,000 in bribes to obtain a multi-million dollar sludge-hauling contract from the Chicago Metropolitan Sanitary District. Co-defendant Janicki was a trustee of the sanitary district. Co-defendant McPartlin was an Illinois legislator. Co-defendant Bull, president of an Illinois towing company, served as an intermediary through whom some of the illegal payments were made. William J. Benton, an unindicted co-conspirator, was vice-president of Ingram Corporation. Benton personally made the illegal payments to the Illinois officials on behalf of Ingram Corporation.

ARGUMENT

1. Petitioner contends that evidence of other similar acts as proof of intent was improperly admitted by the court. This contention is without merit. Petitioner's primary defense at trial was that he did not intend the payments in question as a bribe, but only made them in response to extortion by the other co-defendants. At trial, the government introduced testimony concerning some earlier questionable business activity undertaken by Ingram Corporation in Brazil, and the petitioner's role in that activity.[2] This testimony, indicating that petitioner

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[2]The evidence showed that Ingram Corporation was interested in an off-shore drilling project conducted by Petrobas, a Brazilian oil company partly owned by the Brazilian government. At a meeting with Benton and Chris Daley, another Ingram official, Levindo Caniero, the Petrobas official responsible for procuring the off-shore drilling contractor, agreed to provide inside information to Ingram Corporation to assure that it was the low bidder, in exchange for a "payoff or commission." The contract was then awarded to Ingram

had, on another occasion, approved surreptitious payments to a quasi-governmental official in order to secure preferential treatment on a bid in the absence of extortion, was highly probative evidence on the question of whether the payments to the Chicago officials were made with the intent to bribe.

Rule 404(b) of the Federal Rules of Evidence provides that evidence of other crimes, wrongs, or acts may be admissible as proof of intent. Congress changed the phrasing of this rule that had been suggested by the Supreme Court in order to place "greater emphasis on admissibility." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 7 (1973). The rule permits admission of such evidence under the same standard of relevance as any other evidence, once it has been determined that it is relevant to an issue other than character—here, intent. See *United States* v. *Beechum*, 582 F. 2d 898, 911 n.13 (5th Cir. 1978), cert. denied, No. 78-5774 (Feb. 21, 1979); *United States* v. *James*, 555 F. 2d 992 (D. C. Cir. 1977).

Petitioner suggests that the evidence of Brazilian bribe payments was not admissible in the absence of a showing that petitioner's conduct violated Brazilian law. This contention is untenable. Rule 404(b) is not restricted to other crimes, but also includes non-criminal "acts." See *United States* v. *Senak*, 527 F. 2d 129, 143 (7th Cir. 1975), cert. denied, 425 U.S. 907 (1976). Petitioner's conduct in the Brazil transaction was quite similar to that involved in the Chicago transaction, and testimony as to the intent in

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Corporation through a letter of intent. Caniero then threatened to withdraw the letter of intent because the company had not yet set up a Swiss bank account for him as agreed. Daley informed petitioner of this development, and petitioner put him in touch with an international banker to expedite establishment of the account. Ultimately, $172,000 was paid into the account (Pet. App. 34a-35a).

the former transaction is certainly probative of the intent in the latter.[3] The court was correct in upholding the admissibility of the evidence. *United States* v. *Senak*, *supra*; *United States* v. *Peskin*, 527 F. 2d 71, 84 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976).

Petitioner urges review on the ground that the court below adopted an overbroad rule approving the admission of evidence of minimal probative value under Rule 404(b) wherever it makes criminal intent "more likely". This contention is erroneous (Pet. 16-18). On the contrary, the court held that the evidence of prior acts must have "substantial relevance" to the issue involved (Pet. App. 35a). No conflict with other circuits exists on this issue. In *United States* v. *James*, 555 F. 2d 992 (D. C. Cir. 1977), the court declined to allow evidence of other acts to be introduced on the facts there that the evidence was both of little probative value and quite likely to be prejudicial, since it involved a dramatic and violent scene complete with guns and attempted escapes by leaping from windows. Similarly, *United States* v. *Beechum*, *supra*, is not in conflict with the decision below.[4] The court there required only that the extrinsic evidence relate

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[3]Petitioner contends that "the transfer of these funds was no more relevant to petitioner's criminal intent than any lawful transfer made in or outside the United States" (Pet. 18). But the suggestion that surreptitious payments to obtain preferential treatment are no different than ordinary purchases of goods is insupportable.

[4]Petitioner's contention that the Fifth Circuit would have excluded this evidence on the authority of *Beechum* is contradicted by the vigorous dissent in *Beechum* that characterizes the decision as establishing a much more lenient standard for admission under Rule 404(b) than that prevailing in other circuits, including the Seventh. See 582 F. 2d at 922-923 (Goldberg, J., dissenting).

to an intent similar to the intent of the charged offense, and the court explicitly rejected the suggestion that a "high degree of similarity" was required. *Id.* at 911-914. Petitioner's contention that *Beechum* permitted the introduction of other evidence only because the extrinsic offense was identical to the charged offense (Pet. 17) is mistaken. The *Beechum* court flatly stated that it was not controlling whether the extrinsic evidence also showed a mail theft (the charged offense). 582 F. 2d at 916. The other cases cited by petitioner turn on their own facts and likewise do not suggest any conflict that requires resolution by this Court in the context of the present case.

Petitioner also suggests that this extrinsic evidence should have been excluded under Rule 403 because its potential prejudicial effect on the jury outweighed its probative value (Pet. 20). We disagree. The evidence introduced was most unlikely to have an invidious prejudicial effect. There is no reason to believe that this evidence would have been considered by the jury on any issue other than intent, and, in any case, extensive limiting instructions were given by the court (Pet. App. 40a). The standard applied by the court below in reviewing this determination was proper. It correctly declined to undertake a de novo review of the balancing of Rules 404(b) and 403 and held that the trial court's decision to admit was a proper exercise of its discretion (Pet. App. 40a). See *United States* v. *Sigal*, 572 F. 2d 1320, 1323 (9th Cir. 1978); *United States* v. *Czarnecki*, 552 F. 2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977); *United States* v. *Nichols*, 534 F. 2d 202, 204-205 (9th Cir. 1976). In fact, the trial court took a narrow view of the admissibility of other acts under Rules 404(b) and 403. It denied the government the opportunity to present additional proof of petitioner's involvement with certain kickback

arrangements and a slush fund for distributing money to Louisiana politicians (Pet. App. 34a n.27). It would be inappropriate for this Court to devote its limited resources to reweighing the balance between probative value and prejudicial effect on the particular facts of this case.

2. Petitioner challenges the trial judge's instructions that the defendant need not know or reasonably foresee that the facilities of interstate commerce will be used in order to be guilty under the Travel Act. This challenge is without merit. This situation is closely analogous to that in *United States* v. *Feola*, 420 U.S. 671 (1975), where this Court held that a defendant's knowledge of the jurisdictional peg of 18 U.S.C. 111, that the victim of an assault be a federal officer, is not an element of the offense. It is sufficient to incur liability that the actor had the criminal intent to do the acts specified. The same rule applies for the Travel Act. *United States* v. *Peskin*, 527 F. 2d 71, 78 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *United States* v. *LeFaivre*, 507 F. 2d 1288, 1298-1299 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Doolittle*, 507 F. 2d 1368, 1372 (5th Cir. 1975), cert. denied, 430 U.S. 905 (1977); *United States* v. *Hanon*, 428 F. 2d 101, 107-108 (8th Cir. 1970), cert. denied, 402 U.S. 952 (1971).[5]

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[5]Petitioner's view that the decision below conflicts with *United States* v. *Prince*, 529 F. 2d 1108 (6th Cir.), cert. denied, 429 U.S. 838 (1976), is incorrect. That case dealt with a different factual situation in which all the defendant's activity was wholly intrastate.

3. Petitioner also contends that his conviction should be reversed because the trial judge's instruction on extortion (Pet. App. 25a-27a) was improper.[6] Because the indictment under 18 U.S.C. 1952 alleges that petitioner violated the Illinois bribery statute, Ill. Rev. Stat. ch. 38, §33-1, the court below correctly noted that this contention raises an issue of Illinois law (Pet. App. 27a-28a). See *United States* v. *Kahn*, 472 F. 2d 272, 277 (2d Cir.), cert. denied, 411 U.S. 982 (1973). No constitutional claim has been raised and petitioner advances no explanation of why this issue of state law is appropriate for review by the Court.

In any event, the court below correctly held that the extortion charge was proper. Petitioner's characterization of this issue as an "extortion defense" (Pet. 23-26) is a misnomer. The Illinois bribery statute does not recognize extortion as a defense to bribery nor does any Illinois case authority. *United States* v. *Peskin*, *supra*, 527 F. 2d at 83-84. The evidence presented by petitioner at trial concerning extortion was simply an attempt to negate the element of intent necessary to the bribery charge (Pet. 23). Petitioner cites *United States* v. *Hathaway*, 534 F. 2d 386 (1st Cir. 1976), and *United States* v. *DeMet*, 486 F. 2d 816 (7th Cir. 1973), but these cases do not support his contention (Pet. App. 29a-30a & n.21). These decisions interpret the federal offense of extortion under the Hobbs Act, 18 U.S.C. 1951. In suggesting that they are relevant

[6]This contention is not applicable to all of the counts on which petitioner was convicted under 18 U.S.C. 1952. On some of those counts, relating to payments made prior to February 1972, petitioner's defense was that he did not know of the payments (Pet. App. 25a n.18).

to the instruction that the trial judge should have given to the jury, petitioner is in effect contending that it would have been a complete defense for petitioner if it were established that his co-defendants violated the Hobbs Act. This suggestion is erroneous. Extortion is not a complete defense to bribery unless it is so provided by statute. *United States* v. *Kahn*, *supra*, 472 F. 2d at 278. The mere existence of extortion is no defense "[u]nless the extortion is so overpowering as to negate the criminal intent of wilfulness." *United States* v. *Peskin*, *supra*, 527 F. 2d at 83-84. There is nothing improper about convictions for extortion and bribery arising from the same transaction. *United States* v. *Hall*, 536 F. 2d 313, 321 (10th Cir.), cert. denied, 429 U.S. 919 (1976). A rule that bribery and extortion are mutually exclusive would be unreasonable, since "[a]lmost every bribery case involves at least some coercion by the public official." *United States* v. *Kahn*, *supra*, 472 F. 2d at 278.

Contrary to petitioner's contention, the charge of the trial judge was appropriate (Pet. App. 28a-33a) and completely consistent with the decisions in *Kahn* and *United States* v. *Barash*, 412 F. 2d 26 (2d Cir.), cert. denied, 396 U.S. 832 (1969).[7] The court's instruction on economic loss coupled with the instruction regarding entitlement to the benefit simply set out the undeniable principle that a threat not to grant an undeserved benefit does not constitute extortion. The instruction established a dichotomy between petitioner's contention that he made payments only because the company was being threatened with unreasonable liquidated damages penalties and the withholding of money due for the pipeline (Pet. 7-8) and

[7]*Barash* involved a prosecution under the federal bribery statute, 18 U.S.C. 201, for bribery of Internal Revenue Service agents and therefore is technically not applicable to this question of Illinois law.

the government's contention that the payments were made in order to secure and extend the lucrative sewage hauling contract (Pet. App. 4a-8a). The instruction (Pet. App. 26a) that "[i]f one does not believe he is legally entitled to receive the thing in question, * * * there can be no legal justification for paying a public official to get it" is unobjectionable. Extortion is a possibility only when a benefit to which one is entitled is withheld. *United States* v. *Peskin*, *supra*, 527 F. 2d at 84.

The contention that *United States* v. *Kahn* is somehow at odds with this principle because the "extortion defense was * * * approved" there (Pet. 25) is mistaken. In *Kahn*, the court of appeals rejected the idea of an "extortion defense," noting that the evidence bore only on the intent to bribe (472 F. 2d at 278). The court rejected a challenge to the trial judge's instruction and affirmed the bribery conviction below.[8] Petitioner's additional contention that the court's instruction equated extortion with duress (Pet. 25-26) is also without merit. The duress defense contemplates an imminent fear of bodily harm. This could not be confused with extortion under the court's instruction. *United States* v. *Barash*, 365 F. 2d 395 (2d Cir. 1966), simply held that the defendant there was entitled to an instruction on economic coercion. Petitioner was accorded such an instruction, and it was a proper one.

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[8]Contrary to petitioner's assertion (Pet. 25), the defendant's argument in *Kahn* did not concern withholding of a purely discretionary benefit. The defendant's bid had been accepted by the City Council and he alleged that corrupt officials threatened to withdraw the Council approval unless they were "paid off." 472 F. 2d at 277.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1903

FREDERIC B. INGRAM, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

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1. The evidence which reportedly persuaded a majority of the jury members to change their verdict regarding petitioner from "not guilty" to "guilty" (see our Petition, p. 6, n.3) was testimony concerning a transaction in Brazil which the prosecutor characterized as proof that petitioner had paid "bribes" in that country (Tr. 6141). The government does not defend the prosecutor's inflammatory characterization. Instead, it describes the challenged evidence as "testimony concerning some earlier questionable business

activity" (Br. in Opp., p. 3) and argues that such evidence was admissible under Rule 404(b) of the Federal Rules of Evidence to establish petitioner's criminal intent. In fact, there was not a shred of evidence suggesting that this "questionable business activity" was improper or illegal in Brazil or, indeed, even "questionable" in that jurisdiction. For this reason, the Brazilian transaction could not have constituted any evidence that petitioner harbored any criminal intent whatever when he authorized payments in connection with the Ingram Corporation's contract with the Chicago Metropolitan Sanitary District. Thus, while this line of proof was devastatingly prejudicial with the jury, it was not at all probative on the central issue of criminal intent and should not, therefore, have been admitted.

2. The government totally misconstrues our contention that the decision below conflicts with *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 1244 (1979), which required decision by an *en banc* session of the Fifth Circuit. The government erroneously asserts that *Beechum* required "only that extrinsic evidence relate to an intent similar to the intent of the charged offense," and it wrongly states that *Beechum* "rejected the suggestion that a 'high degree of similarity' was required" (Br. in Opp., pp. 5-6). In fact, the majority in *Beechum* held unequivocally that proof may not be admitted under Rule 404 (b) unless "the extrinsic offense requires *the same intent* as the charged offense." 582 F.2d at 913 (emphasis added). The *Beechum* majority was of the view that when, as was true here, the intent needed to commit the two acts is totally dissimilar, the "extrinsic offense" may not be used to prove criminal intent with respect

to the "charged offense." This point was underscored by the *Beechum* majority when it cautioned that "relevancy is established once *the identity of the significant state of mind* is established." 582 F.2d at 916 (emphasis added). And the dissenters in *Beechum* emphasized this element of the majority's standard by calling attention to, and quoting, the passages of the majority opinion which defined "the requirement that the intent of the extrinsic crime be the 'same' as the intent of the charged crime." 582 F.2d at 923-924.[1] The *Beechum* majority adopted a "more lenient standard" only with respect to the "physical elements of the extrinsic offense" and with regard to the quantum of proof needed to establish commission of the extrinsic offense. 582 F.2d at 910. It did not accept a "more lenient standard" on the question whether there had to be an identity of criminal intent to warrant introduction of the proof of the "extrinsic" act.[2]

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[1] The *Beechum* identity-of-interest test was recently reaffirmed and reapplied by the Fifth Circuit in *United States* v. *McMahon*, 592 F.2d 871 (5th Cir. 1979).

[2] The government also misconstrues our argument when it asserts that the Brazilian transaction was admissible even if it did not constitute a crime in Brazil because Rule 404(b) "also includes non-criminal 'acts'" (Br. in Opp., p. 4). As noted in *United States* v. *Senak*, 527 F.2d 129, 143 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976), on which the government relies, the critical question was whether the extrinsic acts are *relevant* to any element of the charged offense. Some acts, such as those in *Senak*, are relevant to prove the defendant's plan and intent even if they are not criminal. But the Brazilian transaction involved in this case was totally irrelevant if the payments made in that country were neither illegal nor improper. Hence we are not contending that the non-criminal character of the Brazilian transaction rendered it, *ipso facto*, inadmissible. We maintain, rather, that for the purposes the prosecution sought to use the evidence in this case, the absence of proof of criminality or impropriety rendered the evidence irrelevant.

3. The importance of the issue of admissibility of such proof under Rule 404(b) of the Federal Rules of Evidence is demonstrated by the very recent observation of a leading authority on the law of evidence that "any habitual reader of the Federal Reporter soon realizes [that] more appellate opinions deal with Rule 404(b) than any other of the Federal Rules of Evidence." Berger, "Federal Evidence: Procedural Devices, New Decisions Can Keep Propensity Evidence Out," *The National Law Journal* (July 16, 1979), p. 22.[3] There is now great confusion among the federal courts as to when "propensity" evidence may be admitted in criminal cases under Rule 404(b). This case presents a significant opportunity to clarify the identity-of-intent requirement as well as to prescribe the function of an appellate court in reviewing a district judge's ruling on such a question. As demonstrated in our Petition, the court of appeals made no evaluation whatever of the prejudice that was caused by the admission of this proof (Petition, pp. 19-20), and simply abdicated to the trial judge's judgment the balance prescribed by Rules 404(b) and 403.

Such total abdication is a far cry from the proper test—which is for the appellate court to determine, on weighing the probable prejudice of the evidence against its probative value, whether the trial judge has abused his discretion. In each of the three cases cited in the government's Brief in Opposition, the appellate court considered, on its substantive merits, whether undue prejudice outweighed the probative value of the proof admitted under Rule 404(b) and concluded that, on the merits of the contention, there had been no abuse

[3] Professor Berger is the co-author of the five-volume work called *Weinstein's Evidence* (1978).

of discretion.[4] The approach taken in all three of those decisions conflicts, therefore, with the Seventh Circuit's ruling in this case that "only the *manner* in which the district court exercised its discretion," and not the merits of that exercise of discretion, was a proper subject of review. And our petition does not, as the government asserts, ask this Court to "reweigh . . . the balance between probative value and prejudicial effect on the particular facts of this case" (Br. in Opp., p. 7). Rather, it asks this Court to make it clear to courts of appeals that *they* cannot avoid the task of

[4] In *United States* v. *Sigal*, 572 F.2d 1320, 1323 (9th Cir. 1978), the Ninth Circuit held that the evidence of a prior conviction on a charge of possessing narcotics with intent to distribute was "highly probative" and not unduly prejudicial in a trial in which the defendant claimed that he was an innocent unknowing bystander to the importation of marijuana from Mexico. In *United States* v. *Czarnecki*, 552 F.2d 698, 702 (6th Cir.), *cert. denied*, 431 U.S. 939 (1977), the Sixth Circuit discussed, in a long paragraph, whether it was "more prejudicial than probative" to show that the defendant had, on prior occasions, hired the individual who had made extortionate threats against the victim of the charged offense. The court concluded that since there had been no implication that the other employment relations were criminal in nature, the prejudice did not outweigh the probative value of the evidence. (In the present case, of course, the prosecutor went out of his way to imply to the jury that the acts in Brazil were "bribes" and were, therefore, criminal.) And in *United States* v. *Nichols*, 534 F.2d 202, 204-205 (9th Cir. 1976), the Ninth Circuit considered, on the merits, the question whether the defendant's possession of stolen checks could be introduced to prove that he knew that credit cards in his possession had been stolen. Only because checks which had been among those stolen had been made out in the name of the owner of the stolen credit cards, and the credit cards had been used to negotiate the checks, was the evidence pertaining to the stolen checks admitted. The court said that the proof had "substantial probative value" because "[e]vidence of the check cashing with identification by stolen credit cards would dispel the notion that defendant was unaware that the credit cards were lost or stolen." 534 F.2d at 205.

"reweighing the balance" (even granting due weight to the trial judge's exercise of discretion) by deliberately limiting their examination only to the "manner" in which the judge's discretion was exercised.

4. Notwithstanding the government's contrary assertion in a footnote (Br. in Opp., p. 7, n.5), the Sixth Circuit squarely held in *United States* v. *Prince*, 529 F.2d 1108 (6th Cir.), *cert. denied*, 429 U.S. 838 (1976), that even after this Court's ruling in *United States* v. *Feola*, 420 U.S. 671 (1975), the prosecution must prove a defendant's knowledge of interstate transportation as an element of a violation of the Travel Act. Nor, despite the government's contrary implication, did the Sixth Circuit limit the requirement of such proof to defendants whose activities were "wholly intrastate." But in any event, in this case as in *Prince*, all the acts allegedly performed by the petitioner were performed within one state (here, Louisiana). The trial judge's instruction that the prosecution need not prove that petitioner "either knew or could foresee that interstate travel would occur" thus conflicted squarely with the ruling of the Sixth Circuit.

5. If, as the government argues, extortion is not a defense to bribery under Illinois law, and Illinois law controls the defenses available under the Travel Act in this case (Br. in Opp., p. 8), the trial judge should have granted no "extortion defense" instruction whatever. In fact, the trial judge granted such an instruction, thereby indicating that he believed that an extortion defense was available. The convoluted nature of the instruction (which is reproduced at pp. 25a-27a of the Petition), and the fact that it substantially shifted the burden of proof to the defendant to prove "legal

entitlement" and duress sufficient to "substantially impair his ability to exercise free choice," rendered the instruction totally erroneous.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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